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United States of America

IN THE

Supreme Court of the United States

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No. 1075

LOUISE METZINGER,
Plaintiff and Appellee,
vs.
JOSEPH METZINGER,
Defendant and Appellant

JURISDICTIONAL STATEMENT AND BRIEF SUSTAINING PETITION OF JOSEPH METZINGER FOR ALLOWANCE OF APPEAL AND FOR WRIT OF CERTIORARI

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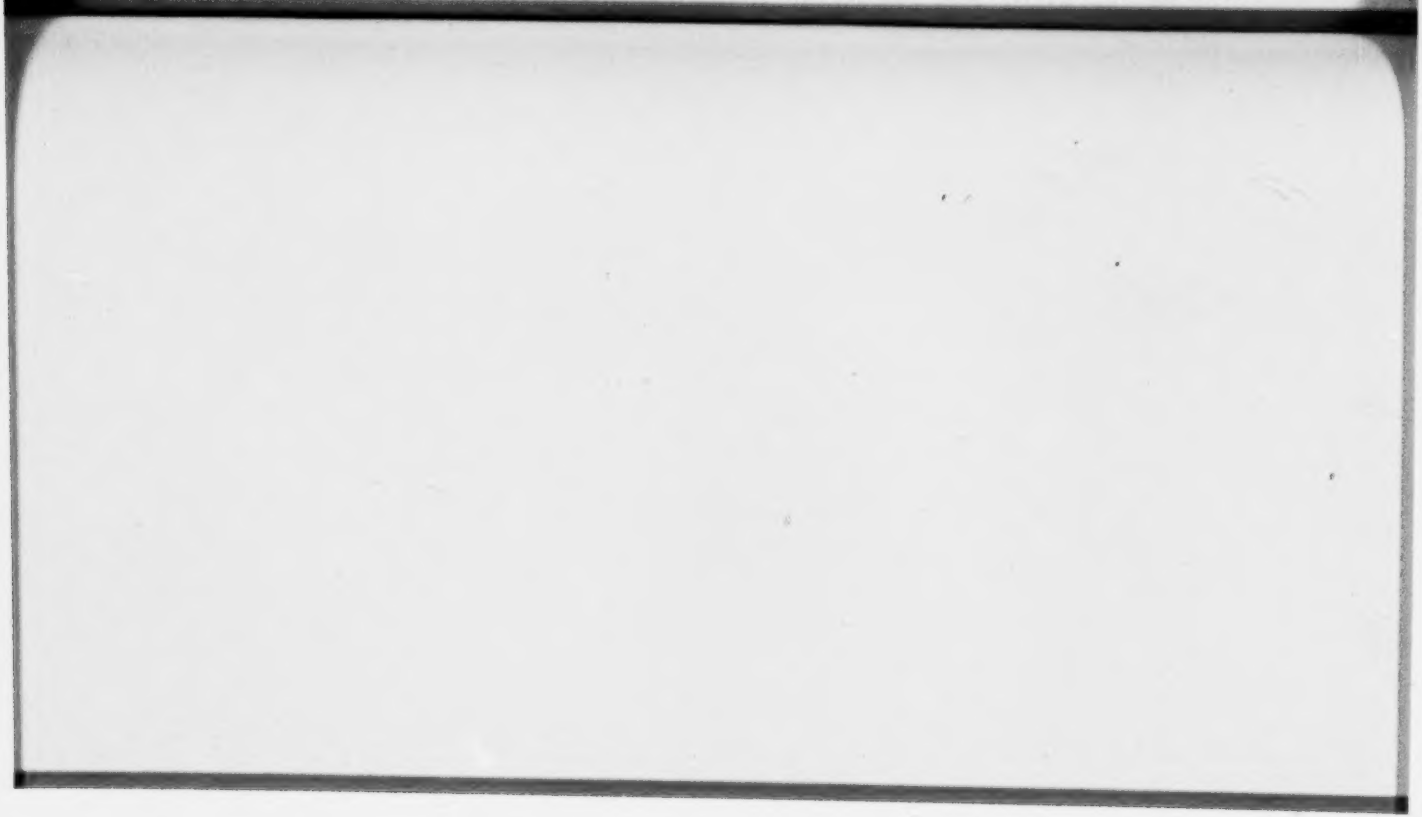

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(Parenthetical references hereinafter are identified: R. for record as printed and filed in the Michigan Supreme Court; B. for Brief for Appellant there filed; P. for petition there asking a re-hearing, other references unabbreviated.)

COMPLIANCE WITH RULE 38 (2)

Pursuant to U. S. Supreme Court Rule 38(2), citing as part thereof Rules 12(1), 26 and 27, this separate statement of the basis of jurisdiction respecting Joseph Metzinger's petition for allowance of appeal as of right, and otherwise for review by certiorari is presented in his be-

half, attaching hereto as appendix for the convenience of the court, under said Rule 38(2):

1. The Michigan Friend of the Court Act: Act 412 of 1919 as amended by Act 306 of 1939—challenged below as repugnant to the 14th amendment, and reproduced from the accepted and unquestioned brief below (B. 248-9).
2. Parallel Wayne Circuit Court Rules 7(e) and (i), likewise challenged and reproduced (B. 250).
3. Opinion applying same filed in the Wayne Circuit Court Feb. 16, 1943, reproduced from R. 69-72.
4. Order in accord with said opinion, entered as final by the Wayne Circuit Court March 5, 1943, reproduced from R. 73-4.
5. Opinion affirming same filed Jan. 2, 1945 by the Michigan Supreme Court, reproduced as published in 17 N. W. 2d, 203-5.
6. Order in accord therewith entered Jan. 2, 1945 by the Michigan Supreme Court.
7. Order entered Feb. 20, 1945 by the Michigan Supreme Court denying application for re-hearing.

STATUTE INVOKED

Jurisdiction is invoked under U.S.C. Title 28, Section 344, also known as Section 237 of the Judicial Code, appeal being petitioned under par. (a) thereof relative to the validity of Michigan statutes cited and challenged as repugnant to the United States Constitution. Certiorari is petitioned under par. (b) thereof, relative to procedural violations of said constitution. And benefit of paragraph (c) thereof is petitioned in behalf of appellant.

The determination of the Michigan Supreme Court so made final is the final determination of the court of last resort in Michigan having jurisdiction over the controversy litigated.

PREFACE

In addition to the Summary and Short Statement of the Matter Involved, presented in the printed Petition For Allowance of Appeal and For Writ of Certiorari, the following remarks preface the statement of circumstances from which each of the five major federal issues herein relied upon arose.

The Circuit Judges of Wayne County, Michigan, attempted some years ago to relieve their burdened hours without increasing the number of judges by substituting proceedings before one whom they jointly selected—at first from the staff of the elective county prosecuting attorney. The officer so appointed was called a Friend of the Court. His office was eventually ratified, first by the County Supervisors of Wayne County, and subsequently by a statute of the Michigan Legislature. The constitutionality of that statute as afterward amended is the issue in this appeal, along with the public concern urged as reason for granting review at pp. 19-24 of appellant's printed petition for its allowance—and the statistical evidence tabulated and graphed sustaining that concern herein at pp. 70-74.

The Friend of the Court was authorized from the beginning by the same authority (ordinance and statute) creating the office to function also as the public prosecutor in each matter referred to him—namely in matters of

divorce and domestic relations. By him every prosecution in those causes was maintained by his licensed barratry. But every cause remained entitled strictly as a private prosecution in the civil court (of chancery). Which side he chose to maintain was left to his own good judgment—but nothing in the record disclosed any notice of maintenance in the behalf of the sovereign power of the People. However, prosecution in the public behalf was supposed to be authorized to avoid burdens that might fall upon the tax-payers because of "minor children in divorce cases, who are liable to become public charges"—to repeat the words in the title of the statute challenged.

No notice to the accused, nor charge authorizing maintenance in the public behalf is thought by the prosecutor to be required. No notice of prosecution in the public behalf is thought by him to be required. Prosecution for crime is not supposed by him to be involved, notwithstanding those words just quoted from the title of the Act. A divorce suit, once litigated, is not supposed ever to be ended. No subsequent judicial process is supposed by him ever to be required to establish jurisdiction in the court notwithstanding the entry of a final decree. No regular or known practice by such Friend of the Court is supposed to be required. His usual practice is concededly based upon investigations of which the defendant is not permitted to have any knowledge whatsoever prior to the final determination entered by the circuit judge, whose judgment is based upon and follows the report of the Friend of the Court, excluding (in the instant cause by explicit order) any further proof on behalf of the accused (R. 71).

Opportunity to examine and cross-examine witnesses may be had only as a special favor. Upon appeal by filing "objections" in the circuit court it is not supposed

the defendant has a right to make any record whatsoever on the merits, although such favor may often be allowed. The rule governing appeal from purely discretionary determinations is there applied.

Results appear to be generally deplorable, without regard to justice or injustice in any particular case. Those results appear to have involved a silent popular rebellion of astonishing statistical proportions and most disturbing import, registered by a nation-wide fall in birth rates, keyed to variant dates coinciding with local establishment of the reformed practice. Similar and identical practices throughout the nation appear to have been established during a generation of social reform under a wide variety of labels and varient details. But the substantial avoidance of due legal process, of regular hearings, and of every semblance of trial, is the subject of this appeal challenging the validity of that statute, a parallel court rule, and the consequent judicial procedure, which thereby imposes involuntary servitude by denial of due process and day in court. The national concern may be reasonably moved by the future military insecurity apparently involved in the most remarkable fall in birth rates probably known to history.

It is that seeming judgment of the people generally, that their courts have failed them and driven them to avoidance of child-birth, which warrants reexamination of the tortured arguments by which for a generation this reformed and revolutionary procedure applying to divorce and domestic relations has been upheld. Public concern requires reexamination by a national authority of the wisdom and legality of the reformed procedure by which have been substituted for criminal prosecutors in several states prosecutors masquerading as judicial officers; star chamber proceedings for due process; social agencies for courts; so-called psychiatrists and social workers for

lawyers; and proceedings purporting to be civil and chancery as a means of avoiding jury determinations, maintained by the licensed barratry of public prosecutors salaried out of general public taxes, in place of honest prosecution for crimes duly charged as the basis for discrimination in the public interest.

It is conceded that due process may be waived, and so is a privilege for which seasonable demand might be required.

Tari v. Ohio, 159 N. E. 594;
Adams v. Slavin, 7 S. W. 2d (Ky.) 836.

But the lack of due process, seasonably challenged and never waived, is hereinafter discussed serially under the five heads outlined in the appellant petitioner's jurisdictional statement, raising and involving the various questions and errors listed in his petition for appeal and certiorari. That statement and petition are here not repeated, in due deference to the rule and requirement for non-duplication, but are by reference made a part hereof, together with the transcript of record praeciped, stipulated, and certified by the Clerk of the Michigan Supreme Court.

The circumstances under which the federal points hereinafter set forth and relied upon were raised by timely challenges citing the United States Constitution, 14th Amendment, Sec. 1, and the 13th Amendment, Sec. 2, and drawing in question said Act of Michigan No. 412 as amended, alleged to be repugnant to said provisions of the United States Constitution, and necessarily held valid by said determination; the substantial nature of the federal questions thus raised; and the judicial procedures likewise challenged; are briefly detailed in connection with said federal points under five numbered heads after the following statement of the controversy and its origin.

INITIATION OF CONTROVERSY

Large funds having been demanded of the defendant appellant by the public prosecuting attorney for Wayne County, Friend of the Court, Edward Pokorny (R. 41; R. 23), unauthorized by any pretended determination of record or any legal judgment, said defendant appellant thereupon petitioned to recover the custody and services of his able-bodied son, then past 12 years of age, and now of near military service age (past 15 years old). Said challenged statute and parallel court rule was then made the pretext of the action in which this controversy arose.

CONTROVERSY

Defendant appellant resists efforts by the plaintiff appellee and the Michigan Prosecuting Attorney for Wayne County entitled Friend of the Court acting under Michigan Public Act 412 of 1919 as amended, otherwise and more fully cited and identified in the attached opinion of the Michigan Supreme Court entered January 2, 1945, to subject the said defendant appellant, Joseph Metzinger, a second time to jeopardy in connection with no crime charged, but relating to his minor son, and thereby amercing him without any compensation whatsoever for no crime known while denying him hearing in due manner on his own petition for the custody and services of said able-bodied son now past fifteen years of age.

RAISING OF FEDERAL ISSUES RELIED UPON

The defendant having appeared only specially (R. 27) to contest the jurisdiction of the trial court, has preserved that contest in that he has contested the merits "in no place" (R. 71) as appears in the trial court's opinion attached hereto, being denied his right there to "make a record" thereon or be heard orally (R. 71, 33, 59). But prior to the entry of said trial court's final determination two affidavits contesting its jurisdiction were filed (R. 28-31; 44-55), and when after entry of the trial court's final determination it was discovered that the consideration and determination of the contest raised by said verified objections had been determined in a judicial investigation by the court based upon representations of fact and argument concealed from the defendant appellant and his legal counsel, a third affidavit (R. 59-64) was filed in aid of appeal. The federal questions raised by those verified statements, and by this appeal relate to due process, or challenge said Michigan Public Act, and its parallel court rule and ruling thereby authorized, as a violation of due process.

CIRCUMSTANCES OF CHALLENGE FOR VIOLATION OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES

The defendant appellant's said verified statements, his brief by counsel, and petition for rehearing present the substantially identical protest, that the process of the court constitutes (R. 29, 49, 63, 4; B. iii; p. 2) "a denial of due process of the law to this defendant contrary to the 14th Amendment of the United States Constitution" in

various particulars; and constitutes a violation of the 13th amendment in addition (B. 56):

> "Involuntary servitude and imprisonment are authorized upon guilt of a crime; U. S. Const. Amendments, Art. XIII, Sec. 1; Mich. Const., Art. II, Sec. 8; merely due process being required in determining the guilt."

No notice to the accused, nor charge that he is guilty of any tortious wrong authorizing discriminatory maintenance in the public behalf for his crime, is thought by the prosecutor, or by the Michigan Supreme Court interpreting said statute, to be required. No notice of prosecution in the public behalf is thought to be required, as by entitlement of the proceedings in behalf of the People of Michigan as complainants. No hearing on any charge that he is guilty of tortious wrong authorizing discriminatory maintenance in the public behalf for his crime, is thought to be required; and the Supreme Court of Michigan, erroneously writing in its opinion that (R. 121) "the circuit judge heard the parties relative to their respective contentions" referred only to the jurisdictional question in the civil phase of the action. The criminal phase it did not choose even to discuss. This it avoided notwithstanding appellant's objection (R. 49), "the said order seeks to deprive this defendant of due notice before the determination of his matter . . . Any determination of said matter upon the basis of said report and recommendation seeks to deny this defendant, who is a citizen of the United States his right to the determination of his said matter upon evidence introduced in open court, his right to face the witnesses in open court who testify against him, his right there to hear all the testimony and know all the evidence that comes to the mind of the court, and

to cross examine all who present the same," — rights existent only against prosecution for crime; and his further objection on appeal (R. 4) referring to the "champertous and barratrous activity of stirring up, and inducing, and causing said litigation" by said salaried public prosecutor,—a barratry licensed only in prosecutions for crime. Such lack of hearing on charge of crime in open court the Michigan Supreme Court chose not to discuss, notwithstanding the third issue raised (R. 4-5) on appeal, further insisting therein on the right (R. 5, par. d) "to face and cross examine . . . in open court, all the witnesses against him, and to be present during all the investigation by the court of his matter,"—a right existent only against prosecution for crime.

Since "assignments of error not discussed in appellant's briefs are considered by the Supreme Court as waived" in Michigan,

Sudinski v. Krohn, 242 Mich. 497,—headnote No. 6;
Michigan Court Rule 67;

the issue was preserved in question II discussed in appellant's brief (B. i; B. 43-83). In that more extensive discussion on the lack of any charge or hearing on charge of crime, after comments on the element of notice, appears the plea (B. 47): "No such charge is pretended as ever having been made giving the Friend of the Court power to act. The statute is not even cited in any charge made, nor any other statute, notwithstanding no action at common law is claimed against Joseph." Nevertheless the Michigan Supreme Court cites the challenged statute as sustaining the conviction for crime without any charge or hearing thereon of crime. Its only reference to any hearing relates to the hearing on the civil phase of the case, not to the criminal phase. That is the only reason-

able interpretation of the Michigan Supreme Court's one further comment on a hearing in its opinion (R. 122): ". . . defendant was timely served with a copy of plaintiff's petition and notice of the time and place of hearing. This is all that is required under the rules and practice of courts in this jurisdiction. Further, defendant was not, by reference to the friend of the court, deprived of a hearing before the trial court. Instead a full and fair hearing before the court was afforded defendant as to the action the trial court would take in considering the recommendations of the Friend of the Court and such testimony as the trial court might see fit to take. The practice and procedure followed in the instant case is fully justified by statutory provisions. See 3 Comp. Laws 1929, Sec. 12783 *et seq.*, as amended."—thus citing the challenged statute.

It is important to note that such hearing referred only to a hearing "as to the action the trial court *would* take." It did not pretend to refer to any hearing on the merits. It did not pretend to allow knowledge of the proceedings from which the defendant and his attorney were excluded.

Such a finding would be contrary to the ruling by the trial court of the defendant, that he (R. 71) "demands the right to make a record in this court. This demand has been denied." It does not perhaps interpret said statute as authorizing the civil procedure without due notice and hearing. But it does interpret that statute as authorizing the criminal phase of the proceeding without any charge or hearing thereon whatsoever informing the defendant that he was being prosecuted in the public behalf under that statute, and was guilty of matter authorizing such discrimination. Such interpretation gives to Joseph Metzinger, it would surely seem, an optional appeal to the United States Supreme Court as of right; the benefit of

which, however, he does not lose by presenting his petition for review by certiorari,

Martin v. Hunter's Lessee, 10 U. S. (1 Wheat.) 304:
28 U. S. C., Sec. 344(b).

Said violation of the United States Constitution by the State of Michigan is discussed in five numbered heads hereinafter seriatim, as follows:

1. Issue of jurisdiction raised on special appearance determined by process excluding defendant appellant and his counsel from knowledge thereof, and from opportunity to respond in that respect;

2. Validity of the challenged Michigan Statute and Court Rule interpreted as granting jurisdiction to impose involuntary servitude based upon service of a process over a decade prior, and at that time finally determined and satisfied:—

   A.

   In a prosecution for crime without either notice of the crime charged or any hearing on such charge, and without any process notified respecting same;

   B.

   As to the civil phase of the proceeding, upon a determination by the opposing litigant judging her own cause that due notice upon the defendant has been served personally upon him notwithstanding his averment to the contrary;

3. Validity of said challenged statute subjecting the defendant unsafely to a discretionary penalty for any effort undertaking to test in court the reason-

ableness of an amercement ordered by the prosecuting attorney;

4. Validity of said challenged statute interpreted as authorizing the trial court to deprive the defendant appellant of a hearing except before a tribunal of which the hearing officer is alleged to be financially interested, partisan, and biased in three particulars:

A.

The only court hearing permitted under said statute is that before a partisan officer empowered by said statute to function both as prosecuting attorney and as judge in the criminal phase thereof, and as referee in the civil phase thereof;

B.

The only court hearing permitted under said statute is that before an officer found by the lower court (acting through Judge Moynihan) to be barratrously and financially interested by the nature of his office in the outcome of the litigation before him;

C.

The only court hearing permitted under said statute is that before an officer, created to weld organized social workers into effective election machinery (required by the judges of both circuit and supreme courts for their re-election to office) at the expense of defendant husbands in divorce and domestic relations cases as a means of maintaining alliance of social workers;

5. Validity of said statute subjecting the defendant appellant for his only hearing to a tribunal unregulated as to matter of discretion by any known practice or rule.

BRIEF ON FEDERAL ISSUES RELIED UPON AND RAISED BELOW

In compliance with Rule 27(2-e), the specification of errors urged and questions raised are again appended for the convenience of the court at the foot of this brief as they appear in the petition filed for appeal and certiorari; but the discussion in the brief follows the foregoing outline.

1.

DETERMINATION OF ISSUE OF JURISDICTION ON BASIS OF REPRESENTED FACTS AND ARGUMENT CONCEALED FROM DEFENDANT APPELLANT

Respecting the certified (R. 119) fact, that presentation of represented fact and argument (R. 56-58; 45; 46; 48; 49; 50; 51; 52) relative to the issue of jurisdiction were concealed (R. 87-92) by the mutual arrangement of the judge of the trial court and said prosecuting attorney from the defendant appellant until after (R. 59) entry of final judgment and sentence against him; regarding which there was no opportunity to protest as being contrary to said 14th amendment guaranteeing due process and equal protection of the law, except on appeal; whereof at the settling of the record on appeal said prosecuting attorney argued (R. 91-2), "This is not a pleading which should have been served upon Mr. Rood or his client, but is merely a memoranda stated between the court and the Friend of the Court, nothing else. It is not a pleading . . . but Mr. Rood classes it as a pleading which should have been served, copies on the other side, and so forth." And the trial court there conceded (R. 91), "I think I

made that clear on the record, didn't I? that I did take these objections and ask your advice and comment before deciding the matters?"—it is noted:

Among the reasons and grounds for appeal this violation of said constitutional provision was urged as number III on pages R. 4-5; and was adversely decided in the ruling Jan. 2, 1945, of the Michigan Supreme Court (R. 122), "The practice and procedure followed in the instant case is fully justified by statutory provisions. See 3 Comp. Laws 1929, Sec. 12783 *et seq.*, as amended (Stat. Ann. 1944 Cum. Supp. Sec. 25.171 *et seq.*) We are not in accord with defendant's contention that for the reason hereinbefore noted—*i.e.*, denial of due process, the cited statute is unconstitutional."

Attention is drawn to the words, "fully justified."

The preservation of that contention appears in the petition for re-hearing (p. 2-3), reciting (p. 3), "But notwithstanding the extensive discussion of that point in the second and third divisions of plaintiff appellant's brief, pp. 43 to 152, this court denied defendant appellant permission to hear and be heard upon the merits of said matter in any court, to know in any court the matter presented against him, and there to meet the same with his own witnesses and testimony, to there cross-examine the witnesses against him, and to have such process anywhere except before the tribunal by said statute established." Among those cited pages in said brief appears an extensive examination of said secret and concealed reception of evidence and argument, particularly at p. 92 *et seq.* For further circumstances set forth pertinent to this determination based upon concealed judicial process, see the statements introducing federal issue No. 4, not presented here except by reference in due deference to the rule against repetitious pleadings.

The attempt by the trial court to determine, upon the basis of an argument and judicial investigation of facts concealed from the defendant, the issue of jurisdiction raised by the defendant's attorney appearing specially for that purpose (R. 33; R. 44 to 55; R. 56 to 58; R. 59; R. 60; R. 91-2; R. 119), would seem too clearly a denial of due process and day in court to require citation of authority. It is held that where one is assailed, there he may defend:

> "The liability and the right are inseparable. This is a principle of natural justice, recognized as much by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."
>
> *Windsor v. McVeigh,* 93 U. S. (3 Otto) 274 at 277.

On a point as to which parties are in court, a presentation of matter "in the absence of parties, and without affording them an opportunity either to be present, or to make timely objection," is a denial of day in court—so held where counsel were "promptly notified of what had taken place and given the opportunity of excepting";

> *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76 at 81.

Even a stipulation that determination shall be rendered is not authority for presentation of matter otherwise than in open court on fair notice, nor "in the absence of defendants and their counsel."

> *Shields v. United States,* 273 U. S. 583 at 586.

"One accused of a crime has a right to a full and fair trial. . . . He is entitled to be present at every stage of the trial."

Ponzi v. Fessenden, 238 U. S. 254 at 260;
Ah Fook Chang v. United States, 91 Fed. 2d 805; ..CCA...

And it was the duty of the trial court to determine the issue of jurisdiction by a process of the court duly notified before proceeding with any other feature of the cause;

"Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. . . . Thus Lord Coke: . . . 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352 b."

Reynolds v. Stockton, 140 U. S. 254; 11 S. Ct. 773 at 777.

From this it appears that because defendant was in court on his own petition, appearing only specially with regard to the petition as to which he alleged no service, he thereby did not give the court authority to decide that unserved petition. He did not give authority to decide it as for default, until first its process was duly notified informing the defendant of jurisdiction being assumed regarding the same, and he had thereafter either met the issue or defaulted.

2.

LACK OF NOTICE—CHALLENGED ON SPECIAL APPEARANCE

2-A.

AS TO THE CRIMINAL PHASE OF THE PROSECUTION

Nobody claims that process of any form has been served on defendant appellant in the case at bar, other than the process served in the divorce suit, ended by final decree, Jan. 20, 1931 (R. iv), fully satisfied the following day (R. vi). Is a 12 year old divorce decree process to subject a party to it to criminal prosecution? It is nowhere suggested in that proceeding. Nor is there any information or indictment charging any crime known to the law in any part of the present proceedings. The sole basis of the judgment entered in this proceeding, is the fact appearing in that divorce proceeding that he is the father of a legitimate child, which in the words of the statute relied on by the prosecution in this case is pretended to be "liable to become a public charge."

The petition of Joseph Metzinger for the custody and services of his nearly mature son duly served (R. 12-15) and put in issue by answer (R. 16-17) was subjected to confusion with said divorce proceding by affidavit of Louise Metzinger importuned by said prosecuting attorney, Friend of the Court (R. 19-25), averring service by herself personally (R. 17) on Joseph Metzinger personally (R. 17) of a motion (R. 10-11) for his amercement on a second jeopardy; based upon said ancient process served in 1930—since it appears in the "Informal Statement and Brief of Friend of the Court" filed on motion for re-hearing, at page 2, quoting Mich. Comp. Laws of

1929, Sec. 12739, that he contends the "court may, from time to time afterwards . . . make a new decree . . ." under the jurisdiction anciently acquired, whereunder a mere pleading without process is required without any limitation whatsoever as to time. He there says, "I know of no rule that prohibits or invalidates the service of a pleading upon the opposite party by a litigant." The lack of notice for failure of the court to inform the defendant by its process announcing its assumption of jurisdiction over the action brought by Louise Metzinger and the said prosecuting attorney was repeatedly urged to be a breach of said 14th Amendment in substantially identical protest, "No due notice of the hearing or of any hearing" (R. 28, par. 1, 2, and 7; 29, par. 6; 30, par. 10; 45, par. 1 and 9; 48-9, par. 8 and 9; preserved on chancery appeal, legally *de novo* at R. 2, grounds I(a) to I(e) inclusive and III; B. i, questions I, II, IV, and VII; B. 38-42; B. 43-65; B. 78-83; B. 92-109; B. 177-181; and on petition for rehearing, P. 2 and 4-6, divisions II, III, and IV).

We here point to the prosecution in the purported public interest conducted by said public prosecuting attorney under his claim of being authorized and licensed, by appointment under said Michigan Public Act 412 of 1919 as amended, to barratrously importune and maintain by aid of political comradery in the purported public interest the action against defendant. The basis of the discrimination in behalf of the political power, as described in the challenged statute, is the crime of parenthood respecting "minor children . . . who are liable to become public charges." The Michigan Supreme Court ruled in its opinion (R. 122), "The practice and procedure followed in the instant case is fully justified by statutory provisions. See 3 Comp. Laws 1929, Sec. 12783 *et seq.*, as amended." No other statute is cited in the

entire opinion (R. 120-122). Not part of the practice, but all the practice and all the procedure in the instant cause are ruled so justified, including every violation of the 14th amendment. That practice and procedure are not partially justified, but fully justified, by that statute. No other statute is interpreted to be required in justification. Whatever the particular language of the statute may seem to mean is not material to any review of that proceeding. It is sufficient that the procedure, such as it appears, is justified by the statute as the Michigan Supreme Court has interpreted it. Interpretation of the provisions of the challenged statute by any other authority is immaterial.

> "Inasmuch as the supreme court, the highest court of the state, has so construed them, such construction must be accepted here as correct."
>
> *York v. Texas,* 137 U. S. 15; 11 S. Ct. 9 at 10.

The proceedings that are so justified are the proceedings had in the instant case, not some other proceedings. The practice so justified is the instant practice appealed, not some other practice. That in some other case a different practice and more reasonable procedure might be applied and at some future time approved by a new interpretation of the challenged statute is not material. The sole question results: whether the practice and procedure actually had, and so justified, constitutes a repudiation of the 14th amendment. If it does, then a review in the U. S. Supreme Court would seem a matter of right, and not of discretion, so that petition for certiorari will be construed as giving power of review as by appeal.

> *Martin v. Hunter's Lessee,* 10 U. S. (1 Wheat.) 304.

In other words; if the defendant has been adjudged without due process legally served, the Friend of the Court statute is void; if the defendant has been convicted without due information of the wrong whereof he was convicted, the challenged statute is void; if the defendant has been adjudged without hearing, the statute challenged is void; if the pretended hearing was a denial of due process, the statute is void; if the tribunal created by the statute lacks a known procedure and a practice regulated by known rules, the statute, for combining in the hearing officer the functions of advocate and umpire, prosecutor and judge, and permitting no other record to be had on the merits (R. 71), is unconstitutional and void.

Roller v. Holly,—discussed below at pp. 76-80.

If the determination of any issue in the instant cause involved a hearing from which the defendant and his attorney were excluded, the said statute is void. If the conduct of the matter was such as to deny the defendant an opportunity to have jury trial, the statute is void. And it should be so held by the United States Supreme Court whether petition is by appeal or certiorari.

U. S. Code, 28: 344 (b).

It is particularly notable, that, although prosecution is claimed and held under said statute to be in the public behalf, yet care has been taken to avoid giving the defendant any notice whatsoever of such prosecution. The matter is not entitled in behalf of the public, or of the state, or of the people. The challenged statute is not cited to defendant, or in any pleading served. No known crime appears anywhere in the record charged to the defendant appellant, by title to the cause, or as described in said statute, or otherwise, either served or unserved, whereby if served he might be notified of prosecution by

public officials sustained by taxes on the general public in the public interest, and might be assured thereby of that due process due in every criminal prosecution to the accused. But the court ruled all was authorized under said challenged but unnoticed Act 412—being 3 Comp. Laws of 1929, § 12783 *et seq.*, as amended.

The defendant appellant has been subjected to that prosecution and discrimination. He has been found guilty of that charge. He has been amerced without compensation upon that conviction. And a prison sentence stares him in the face upon his failure to find and deliver the amount of the uncompensated amercement or fine.

In re Lupu, 285 Mich. 500.

It is immaterial what the state of Michigan proposes under that statute to do with that amercement. The involuntary servitude so established may have been upon the most deserving public charity. The basis of the discrimination nevertheless answers every characteristic of a crime. The prosecution and conviction were for such crime. The fine and imprisonment are for such crime.

Crime lies not in the alleged wrong or tort, but arises in and out of the manner of its prosecution. It can only properly be defined as the basis for discrimination and prosecution in the public behalf. It is true that under some forms of actions, such as *qui tam* actions, the prosecution may be conducted by one who is not salaried out of general taxes, and so some confusion might arise leading to such expressions as quasi-criminal. But where the officer conducting the prosecution or maintentance is a public officer salaried for that special prosecution out of general public taxes, as under the challenged statute, there can be no question or doubt that the prosecution is then a criminal prosecution entitling the defendant to

all the special provisions for due process that criminal actions involve. The defendant subjected to licensed barratry is thereby accused of crime.

> "Although the same act may constitute both a crime and a tort, the crime is an offense against the public pursued by the sovereign, while the tort is a private injury which is pursued by the injured party."
>
> *14 Am. Jur.* 755.

> "The distinguishing feature between a crime and a tort is the manner in which they are respectively pursued."
>
> *Bergman v. State,* 187 Wash, 622; 60 P. 2d 699; 106 A. L. R. 1007.

This court has noted that all prosecutions for crime were at one time strictly private actions in tort, even as to murder and treason.

> *Hurtando v. State of Calif.,* 110 U. S. 516; 4 S. Ct. 111.

Frequent confusion has led many to feel that a sharp line cannot be drawn between civil and criminal prosecutions. Such confusion has frequently led confused persons to use such words as "quasi-criminal," where licensed barratry has been permitted to conceal a prosecution in the public behalf behind a privately entitled action. In some states, for example, though no such confusion is longer permitted relative to treason or murder, it is permitted relative to such matters as bastardy,—held variously to be purely civil, purely criminal, and in some states a confused combination.

> "Distinction between torts and criminal cases was not clear."
>
> *Tumey v. State of Ohio,* 273 U. S. 510 at 525.

Such was the early condition. Such is still the condition with many people. But whenever discrimination in the public behalf is permitted, as by the licensed barratry of public officials sustained out of general public taxes, the basis of discrimination is called a crime. And against that licensed barratry due process has conceded special protections to assure a fair trial, because of the great power of influence and political comradery thereby arrayed against the defendant. That due process in prosecution for crime is well known.

> *Cooley on Constitutional Limitations,* Chapt. X, Section on criminal accusations *et seq.,* 7th ed., pp. 436 *et seq.*

There we find listed the numerous requirements of due process peculiar to prosecutions for crime,—requirements that have been assiduously avoided by the court and prosecution in the instant cause under the interpreted authorization of the statute challenged. He has been presumed guilty by the order referring the matter to the public prosecutor and the judgment upon his recommendation without opportunity for hearing elsewhere (R. 42; R. 73; R. 71), instead of being presumed innocent. Such appellate review as he might have on filing "objections" did not involve right to make record (R. 71). The finality of the prosecuting attorney's determination is evident:

> "Appellate review in respect to evidence is such that the judgment can only be set aside by the reviewing court on the ground that it is so clearly unsupported by the weight of evidence as to indicate some misapprehension or mistake or bias on the part of the trial court, or a wilful disregard of duties."
>
> *Tumey v. State of Ohio,* 273 U. S. 510 at 517.

Instead of being protected from self-incrimination, he was subjected to inquisition after the strict exclusion of his counsel (R. 33; R. 34; R. 37) for the purpose of obtaining evidence intended to be used against him in the criminal prosecution, and without any opportunity to be informed which questions he need not answer. Instead of being allowed counsel, that was denied him (R. 33; R. 34; R. 37). Instead of being granted public trial, where only could he be assured of reasonable honesty on the part of the judge, he was subjected to the determination of matters as to which he was in court, but regarding the reception of representations concerning which he was excluded (R. 56-58; R. 59-64; R. 87-94; R. 33; R. 27; R. 119). And note that such is the "practice of the Court generally," in the words of the trial judge (R..90), and is conceded to be the usual practice of the Friend of the Court by indeed a Justice of the Michigan Supreme Court (B. 122-127),—illustrated further in the case at bar by the nature of the first report attempted (R. 113-118; B. 96-102). Instead of being confronted by the witnesses against him, their evidence was presented to the court while he and his counsel were excluded; although where life and liberty are at stake (as for felony), the defendant is not even permitted to waive his right to be present, but is held present under arrest. Instead of being assured right to trial by a competent, disinterested, impartial, and unbiased tribunal, he was required by the challenged statute to be subjected to a tribunal so constructed by said statute that it could not conceivably constitute such a tribunal,—all notwithstanding his timely objections. Instead of being protected from double jeopardy, he is by said statute subjected to indefinitely multiple jeopardy, and to severest penalty for any attempt to test the reasonableness of subsequent discretionary demands.

Of all these elements of that process which Justice Cooley, in that section on criminal accusations, has pointed out to be due process; the defendant has been deprived in a prosecution for crime brought and maintained in the concealed behalf of the political power of Michigan.

One may be deprived of his property, his wealth and earnings, his services, and his liberty. But that may be done legally only upon due compensation, or by an amercement or a fine; that is, either by proceedings for value, or for tort (in behalf of a private citizen), or for the same wrong called a crime (in behalf of the political power). But if the defendant is to be subjected to the nearly irresistible power of political prosecution, he is entitled to all the processes, including due notice of that discrimination and opportunity to demand such processes, which are due in every criminal action. In Michigan that includes a jury.

> *Ordinance of the Northwest Territory,* Art. II of Sec. 14.

If the interest of the political power be involved, so that the prosecution is in the public behalf, and political, then the defendant is entitled to have notice of that fact. He is entitled to know that discrimination is claimed. He is entitled to know of the crime charged. He is entitled to a hearing on whether the basis of that discrimination is a fact,—whether he be guilty. Maintenance by the political comradery of the sovereign power otherwise is an unlicensed barratry for which the individual so abusing his official power and position may be prosecuted both civilly and criminally.

> "A barrator is defined to be a common quarreller in his own cause; 8 Cro. 36, b., or an exciter or main-

tainer of quarrels or suits; Co. Lit. 368; whether in courts of record or before inferior tribunals, *ibid.*"

4 Petersdorff Abridg. Common Law. Dig., 158, footnote.

And see:

4 Petersdorff Abridg. Common Law Dig., 157-8;
12 Petersdorff Abridg. Common Law Dig., 398, footnote;
Backus v. Byron, 4 Mich. 535;
Fetters v. Wittmer Oil & Gas Properties, 258 Mich. 310;
Wells v. Brown, 226 Mich. 657;
Hightower v. Detroit Edison Co., 262 Mich. 1.

Those cases are extensively discussed at B. 69-81 in support of the general rule,

32 Cyc. 541,

that courts will not permit such wrongful use of their process, but the state of Michigan chose to deny this appellant the equal protection of the law guaranteed by the 14th amendment.

Where the interests of a private litigant are joined in prosecution of a crime with the interests of the sovereign, other defendants are granted a reversal of any conviction so obtained.

Sneed v. People, 38 Mich. 248;
Meister v. People, 31 Mich. 99.

The subjection of the defendant appellant to a political prosecution without notice and opportunity to demand those processes due in every criminal prosecution for the purpose of assuring due process is itself a denial of due

process. Defendant appellant was entitled to be notified that the prosecution was for a crime and in the public behalf. He was entitled to a hearing and trial of the charged basis for such discrimination. Concealing that discrimination under the title of a private litigation was a denial of due process. Concealing that discrimination under color of a chancery proceding so as to deprive the defendant appellant of his jury trial was a denial of due process. Compelling him to rely upon such oral protests as might under such a proceeding be offered in the private office of a master in chancery authorized to serve in the cause also as prosecuting attorney was clearly a denial of due process. Subjecting him for any hearing on such point to the procedure in privacy of the Friend of the Court under said statute, whose power and authority of office, and his application thereof, is wholly unregulated and ungoverned by any known practice or rules whatsoever, is most certainly a denial of due process. Holding the defendant appellant to have been duly convicted by such proceedings in chancery of being the father of a minor child liable to become a public charge, without any accusation that the defendant was so guilty, was clearly beyond the jurisdiction of the court, and its whole procedure based thereon was a violent repudiation of the 14th Amendment to the United States Constitution.

The right of due process must "rest on a basis more substantial than favor or discretion,"

> *Roller v. Holly,* 176 U. S. 398; 20 S. Ct. 410 at 414.

> "The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the

courts are not authorized to exert their power in that way."

Windsor v. McVeigh, 93 U. S. 274 at 283.

And in that case at the end of that page we find the fundamental rule: "Jurisdiction is the right to hear and determine, *not* the right to determine without hearing." It is the near certainty of that very abuse that forbids unregulated proceedings in chambers to be substituted for proceedings in open court.

Roller v. Holly, 176 U. S. 398; 20 S. Ct. 410 at 414;
Parsons v. Russell, 11 Mich. 113 at 120;
Risser v. Hoyt, 53 Mich. 185 at 209;
Underwood v. People, 32 Mich. 185 at 209;
Dullam v. Wilson, 53 Mich. 392 at 409.

Except for the avoidance in the court below of such due process by the prosecution under the approval of the court, the defendant appellant would have had his opportunity to demand jury trial which may not in Michigan be avoided in criminal actions even by the wish and authority of the legislature and courts.

Since the defendant appellant has never entered his general appearance, nor default been duly entered against him, he is still entitled upon receiving the court's process granting him a hearing to demand and compel a jury trial, and for lack of that opportunity has been denied the due process guaranteed by the 14th amendment and defined in the Ordinance of the Northwest Territory. The right of jury trial is inalienable in that Territory northwest of the Ohio River, where the prosecution is maintained in the public behalf for a tortious wrong.

Ordinance of the Northwest Territory, Art. II of Section 14;

U. S. Const., 14th Amendment, Sec. 1;
Michigan Const., Art. II, Sec. 16.

However other parts of the United States may have seen their fundamental rights whittled away, the United States Government has established that the rights defined in the Northwest Territorial Act to be due process shall be guaranteed under the 14th Amendment. The language of the Northwest Territorial Act is clear and definite, and is superior to any act of the State of Michigan:

> "The inhabitants of the said territory shall always be entitled to the benefits . . . of the trial by jury; . . . of judicial process according to the course of the common law . . . no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."
>
> *Ordinance for the Government of the Territory of the United States, Northwest of the River Ohio,* Article II of Section 14.

Those provisions do not allow one to be deprived of his liberty, services, and property in a manner contrary to the common law except by the strictest interpretation of any statutes abrogating the common law. Nor may he be so deprived except by a jury of his peers over his timely objection. No room is allowed in that provision for any restriction of those rights, since if the legislature or the temporary majority of the people (or supposed influence and sentiments) may restrict in part those rights so defined and guaranteed, there is no limit to such

restriction, and they may wholly deprive the citizen and the defendant appellant of such rights as their multitude commands, and wholly irrespective of any fundamental rights of the helpless minority that might be urged.

Such is the due process of which the defendant appellant in this cause has been deprived. Such is the due process so defined in that ordinance, and which the 14th Amendment has further guaranteed by placing it beyond the power of Congress to withdraw. However the Supreme Court of Michigan may have chosen to interpret in this particular case the Michigan Constitution and the 14th amendment of the federal constitution, its interpretation may not legally deprive the defendant appellant of his due process. The involuntary servitude which it has imposed also clearly violates the 13th Amendment, Sec. 1, forbidding such servitude except upon conviction of a crime duly prosecuted as in the Northwest Territorial Act required.

The subpoena served upon and recognized by the defendant, requiring him to testify at the command of the public prosecutor (R. 34), and afterwards sought to be owned by the private attorney for Louise Metzinger (R. 40), cannot be urged as a due process requiring the defendant to defend, since one may not be required to testify against himself in a prosecution for crime. This also is the rule of due process by common law northwest of the Ohio River. And it is a privilege and immunity of every citizen of the United States, that he shall not be required in that territory to give evidence against himself in a criminal proceeding. This is the accepted rule of common law since *Entick v. Carrington and Three Other Kings' Messengers,* 19 How. St. Tr. 1029, cited and quoted by this court in its own ruling against "insidious disguises":

> "'It is very certain that the law obliges no man to accuse himself, because the necessary means of

> compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that the search for evidence is disallowed upon the same principles. Then, too, the innocent would be confounded with the guilty.' . . . The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . Any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment."
>
> *Boyd v. United States,* 116 U. S. 616; 6 S. Ct. 524 at 532.

In that opinion this court does not indeed explicitely define a crime as the tortious basis of a discrimination in the behalf of sovereign power, but does apply this principle to a suit "not technically a criminal proceeding" which it holds is not relieved from the 4th and 5th amendments to the federal constitution, since it is "within the spirit of both,"—since obviously a penalty, amercement, or fine, is merely an uncompensated requisition of rights and property.

> "If the government prosecutor elects . . . a civil information . . . —that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."
>
> *Same,* 116 U. S. 616; 6 S. Ct. 524 at 534.

And see Justice Miller's opinion therein, at 116 U. S. 616; 6 S. Ct. 524 at 537.

Moreover, the subjection of the defendant appellant to that subpoena without permitting him the protection of legal counsel (R. 33; R. 34; R. 37; R. 4-5, ground III; B. iii, question VII; B. 89-96; P. 2-3) was a violation of due process, and a repudiation of the 14th amendment and of the court's own jurisdiction:

> "A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture."
>
> *Same,* 116 U. S. 616; 6 S. Ct. 524 at 536.

Again, where the court permitted a state elsewhere than in the Northwest Territory to compel self-crimination. Justice Harlan in his dissenting opinion continued to urge the immunity as an inalienable right of every citizen of the United States, without the respect or reference to the Northwest Territorial Act.

> *Twining v. New Jersey,* 211 U. S. 78.

But the Michigan Supreme Court in the instant cause has denied to the defendant appellant the equal justice not merely by that Ordinance required and the 14th Amendment guaranteed, but by the Michigan Constitution and ruling decisions recognized for all other litigants.

> *Mich. Const.* Art. II, Sec. 16;
> *Soeckle v. Ehlers,* 37 Mich. 261;
> *Probate Judge v. Abbott,* 50 Mich. 278.

The holding below that the challenged Friend of the Court Act and Court Rule authorized convicting the defendant appellant of being parent to a minor child liable to become a public charge, without any notice or opportunity for hearing whatsoever respecting such accusation,

presents a federal question upon which appeal is of right under the Congressional Act invoked providing for jurisdiction,—held valid when challenged by the high court of Virginia.

Martin v. Hunter's Lessee, 10 U. S. (1 Wheat.) 305.

In that case the clause was invoked respecting a state judicial action voiding the congressional statute providing appeal as of right. In the instant matter the clause of the same section is invoked respecting a state legislative enactment and parallel court rule undertaking to void the 14th Amendment to the U. S. Constitution respecting the requirements of due notice to the accused that he is prosecuted in the public behalf for being such a parent, and requiring due hearing thereon.

Failure of the court below to grant any hearing whatsoever respecting such accusation renders its determination wholly void. There is no valid determination that the defendant appellant is the father of a child liable to become a public charge. The entire proceeding below based upon such determination is therefore void, depending as it does by the opinion of the Michigan Supreme Court upon that challenged Friend of the Court statute. It is void for lack of hearing.

Windsor v. McVeigh, 93 U. S. 274.

It is also void because no charge of such offense appears anywhere in the record or is pretended to have been made.

U. S. v. Insurgents of Pennsylvania, 2 U. S. (Dallas) 335;

Beck v. United States, 145 Fed. 625; 76 C. C. A. 417.

And if it be urged that the ancient divorce decree amounted to a conviction of such crime, or an information at least upon which a trial might proceed in the public behalf for the crime of parenthood to a minor liable to become a public charge; then the defendant appellant has been denied speedy public trial. He may not by such deliberate delay be subjected throughout interminable years to the whim and caprice unregulated of the prosecuting attorney Friend of the Court to demand at his whimsical pleasure unauthorized funds, upon penalty of having the amount demanded increased in a severely penalizing degree if the victim undertakes a court test of the reasonable amount of such demands. Speedy public trial is one of the privileges guaranteed by the 14th amendment, and the Northwest Territorial Act, Art. II of Sec. 14.

> *U. S. v. Cadarr,* 197 U. S. 475; 25 S. Ct. 487 at 488.

The common law mentioned in the cited article of the Northwest Territorial Act appears to offer at least a reasonable rule of limitation:

> "At the common law, and in the absence of special statutes of limitation, the mere failure to find an indictment will not operate to discharge the accused from the offense, nor will a *nolle prosequi* entered by the government, or the failure of the grand jury to indict."
>
> *U. S. v. Cadarr,* 197 U. S. 475; 25 S. Ct. 487 at 488.

Such being the rule where there has been a delay in the filing of information or the finding of an indictment, one may reasonably note that after such an information or indictment an unreasonable delay is fatal and does dis-

charge the accused. And mere informations are sufficient substitutes for grand jury indictments at the common law:

Hurtando v. Calif., 110 U. S. 516.

Therefore, if the ancient divorce decree constitutes an indictment, or information, or equivalent basis for criminal action, the Cadarr case cited above imports an unconstitutional delay in trial, where the prosecution upon such information is delayed over a decade. The loose interpretation of the Friend of the Court Act in abrogation of the common law, and loosely creating new crime beyond its clear strict language, is ruled by the Michigan Practice not permitted:

Risser v. Hoyt, 53 Mich. 185 at 192.

It is next urged, respecting the prosecution of the accused in behalf of the sovereign power and public interest, though not so admitted or confessed in the technical entitlement of the cause against the defendant appellant, that his appearance specially to contest the court's jurisdiction cannot be deemed an appearance waiving lack of notice, where he has (R. 71) "in no place" and at no time undertaken in any way to enter upon the merits of the litigation.

> "The defendant would be free to rely upon the defense by letting judgment go by default."
>
> *Chicago Life Ins. Co. v. Cherry,* 244 U. S. 25.

Can the prosecution trick the defendant appellant into jurisdiction by confusing its action with the litigation which he instituted? He filed his own petition (R. 12-14) duly served (R. 15) and answered (R. 16-17), after being subjected to demands for undetermined funds (R. 21-24) by requisitions made (R. 22) Apr. 25, 1942 and May 7,

1942, subsequently disclosed as being in the total amount (R. 116; R. 114) $262.50. Warned of his refusal to obey said demands for money and of his determination to seek recovery of the custody of his nearly mature son and the services of the able-bodied boy, the Friend of the Court undertook and succeeded in confusing that litigation instituted by Joseph with the ancient divorce suit by hastening the preparation and filing of a petition on behalf of Louise Metzinger (R. 10-11). This he says is not a process in a new action, or a cross-bill in the action of Joseph, but is a mere pleading, as he calls it in his Informal Statement and Brief of Friend of the Court at p. 2, in that ancient divorce action. Then he induces Louise Metzinger herself to determine that that pleading has been duly served (R. 17-18), and sends Joseph a postal card which he assumes to be a mere notice of consideration on his own petition (R. 97), and which Joseph's lawyer belatedly discovers to indicate a petition filed by Louise, thereby permitting a special appearance to be entered contesting the jurisdiction of the court over Joseph respecting the petition of Louise. Joseph himself has consistently denied ever having been served with the petition of Louise (R. 28, par. 1, 2, and 7; R. 29, par. 6; R. 30, par. 10; R. 45, par. 1 and 9; R. 48-9, par. 8 and 9). Is it now to be held that because he was in court respecting his own petition duly answered and at issue, he is therefore in court respecting a petition which he claims has never been served on him, and respecting which his only appearance is insistently special to dispute jurisdiction? That would seem hardly reasonable, and would certainly be repugnant to the ruling of this court quoted above at the close of Federal Point No. 1.

Reynolds v. Stockton, 140 U. S. 254; 11 S. Ct. 773 at 777.

2-B.

AS TO THE CIVIL PHASE OF THE PROSECUTION

All that has been said heretofore respecting the law applying to notice as to the criminal phase of the prosecution applies equally to the civil phase.

As to the prosecution of the private phase of said matter, the only notice pretended, and that lacking any process acknowledging the court's assumption of jurisdiction, appears (R. 17-18) to be the void determination entered by Louise Metzinger, defendant appellant's opposite party, in her affidavit that he had by herself personally been duly served personally. Without repeating the facts recounted here on pages 36-7, it is evident that there is no competent evidence whatsoever in the record to show any sort of notice from which a reasonably prudent and intelligent man could suppose action was pending against him.

Joseph's own affidavit sustaining objections to jurisdiction averred, "No due notice of the hearing or of any hearing upon said petition has ever been served" (R. 28) and "No due notice of the hearing, or of any hearing, upon the petition of Louise Metzinger . . . has been served upon this defendant summoning him into court" (R. 45). In the same later affidavit appears the further averment (R. 49), "Said order seeks to deprive this defendant of due notice before the determination of his matter." But instead of any process, command, writing, or other due notice to the defendant appellant to enter his defense, the court wrote in its filed opinion (R. 71), "On advice of counsel he did not appear and demand the right to make a record in this court. This demand has been denied." Jurisdiction was so left undecided till the decree.

As to the only hearing pretended, that in the office of the prosecuting attorney authorized by an order of reference (R. 42-3), the only service pretended of that writ is the copy mailed to Royal D. Rood (R. 66; 112), who had not entered any appearance whatsoever in the criminal action, or in connection with the petition of Louise Metzinger, except specially (R. 27) to contest the court's jurisdiction, and was not authorized to receive service thereof on behalf of Joseph Metzinger.

In the cited page of the Informal Statement and Brief of the Friend of the Court, p. 2, we find the argument, "I know of no rule that prohibits or invalidates the service of a pleading upon the opposite party by a litigant in the cause."

This is a claim that the service pretended by Louise Metzinger was based upon the process more than a decade prior in her ancient divorce suit—despite the final determination by final decree filed therein (R. 6) Jan. 20. 1931, and full satisfaction entered by her attorney (R. 8) the next day. Without question, after a party is actually in court by the court's proper process, the delivery of papers and pleadings back and forth between the parties or their attorneys requires no neutral and disinterested person or official to satisfy the court of its jurisdiction. But where a pretended pleading is intended to function as an actual process, to bring into court one who has been legally discharged prior thereto by a period exceeding that which regular rules of limitation have defined, such a function may not be performed by the interested litigant herself permitting her to be the sole judge of her own cause, whether due notice of hearing has been given, and of her complaint or declaration.

Various rules of limitation against revival of that ancient suit have been published, which require at the very

least that thereafter any revival, if legal at all, can only be accomplished by a new process, served obviously by someone other than the litigant herself.

> "Public policy dictates that there shall be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that the matters once tried shall be forever settled as between the parties."
>
> *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522 at 525.

After such an end to litigation the least that can be required if revival be permitted is a new process personally served, to validate any personal liability:

> "Due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."
>
> *Pennoyer v. Neff*, 95 U. S. (5 Otto) 714 at 734.

In Michigan the published rules of limitation define the time period—citing the rules in force at the time of the pretended service:

A common rule to plead may be entered and served, signed only by the litigant or her attorney, functioning as a court process, and required to be merely such rule as to which one is "entitled of course, without showing special cause,"

Mich Court Rule 12(1) and (3);

or any action may be instituted by original writ, giving regular notice of 15 days,

Mich Court Rule 13 (1) and (3);

and upon such service accomplished, but not otherwise, issue shall be joined by pleadings,

Mich. Court Rule 27 (2), (3), (4), and (6);

If a cause be not so instituted, it must be deemed either a matter upon motion for new trial filed "within twenty days after entry of judgment,"

Mich Court Rule 47;

or, "On proper cause shown, a rehearing of an equitable action may be had. No application for such rehearing shall be heard unless filed within two months from the entry of the final decree, except where application is made on the ground of newly discovered evidence, in which case the application must be filed within four months."

Mich Court Rule 48 (1).

The instant cause is obviously within that rule, on the ground of newly discovered evidence, and has also the advantage of a statutory provision holding divorce causes open interminably for revision, and a provision in the divorce decree itself (R. 7) "until the further order of the court," thereby also holding the decree interminably open for revision.

The statutory provision here mentioned is relied upon by the Friend of the Court in his Informal Statement and Brief of the Friend of the Court, at p. 2,

Mich Compiled Laws, 1929, Sec. 12739; Mich Stat. Ann. 25.97;

on which page he erroneously claims service on June 2nd, apparently intending July 7th, and confusing a proof of service on Louise filed July 2nd((R. 15; R. iv; R. 17) with her affidavit filed July 7th.

The identical requirements for institution of new proceedings are required by the statutes of the legislature as by the rules of the court cited above:

Mich. Compiled Laws, 1929, Sec. 14067; 14068; 14069.

Any re-opening of settled litigation otherwise than by new process is governed by those various provisions. As the law stood during the litigation of the instant matter, while the base-ball hung in mid-air—so to speak, the determination by the Michigan Supreme Court seems quite persuasive:

> "Petition to reopen divorce decree, asking for rehearing of original cause, or review of equities of decree, was properly barred by lapse of time" (citing Court Rule 48 above).
>
> *Tuthill v. Tuthill,* 259 Mich. 272—headnote No. 3.

In that case the petition to revise the decree was filed some 17 months after entry of the final decree. But in the instant cause the petition seeking modification presented newly discovered evidence, or in other words, new facts, warranting not merely a review of the old case, but a revision, requiring merely a due process into court.

> *Gould v. Gould,* 226 Mich. 340.

And even where the cause is held open for revision by specific language of the court hearing it, of which the parties have actual knowledge, and not by some statute or regulation of which their knowledge is probably only constructive, as in the instant cause, the rule of limitations is still held to be binding in Michigan as to other litigants, and the defendant appellant is merely denied equal justice notwithstanding the 14th Amendment:

> "As appellant's petition to amend the order was filed more than three months after its entry, the fact that the estate was held open did not operate to give the court jurisdiction to amend."
>
> *In re Dowling's Estate,* 308 Mich. 129; 13 N. W. 2d, 233 at 236.

It is notable that the Court Rules published by the Supreme Court in Michigan are superior—but they shall be general rules, not particular rules giving unequal justice to different parties.

Mich. Const., Art. VII, Sec. 5.

These are the rules of limitation established in Michigan to be the common practice, and therefore the common law. Since rules cannot be changed while the base-ball hangs in mid-air, those are the rules protected by the Northwest Territorial Act, under the expression "common law," and guaranteed as due process by the 14th Amendment of the U. S. Constitution forbidding merely change of the rules after the event to which they apply.

Under those rules and that constitutional guaranty, it is contended that the ancient divorce decree, if subject to revision under the statute cited, or "the further order of the court," is not so subject except upon a new process duly served by some party other than the litigant herself—or at least by some other party witnessed, who is not a party litigant.

Under the confusion seemingly deliberately planned by the Friend of the Court to deprive the defendant of any notice whatsoever of the petition against him, it would appear obvious that Louise Metzinger may not be the sole witness, and the judge of her own cause, respecting the issue of jurisdiction, whether due notice has been given Joseph Metzinger of the action against him.

> "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule."

Tumey v. State of Ohio, 273 U. S. 510, at 522.

And while there are exceptions to that rule when no other officer or person is available under the law to function, that exception would seem not to apply in the instant cause. So it has actually been determined in Michigan, respecting an official process:

> "The plaintiff could not serve summons in his own favor."
>
> *Bush v. Meacham*, 53 Mich. 574.

Therefore the determination of Louise Metzinger (R. 17-18) was void absolutely *ab initio*, and incapable of being affirmed or confirmed by the court. The refusal of the Michigan authorities to apply the common law in this respect, thereby depriving the defendant appellant of due process and that equal justice guaranteed by the 14th Amendment, should accordingly be reversed.

Finally it is urged respecting the action by Louise Metzinger in her own behalf, that the presence of the defendant appellant in court generally on his own petition and specially on hers does not constitute such an appearance as permits the court to assume jurisdiction without some sort of legal process informing the defendant that he must make his defense, and appointing a time and place where same may be heard. That such jurisdiction cannot rest upon the actual appearances recorded would seem obvious:

> *Reynolds v. Stockton*, 140 U. S. 254; 11 S. Ct. 773 at 777;
> *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25.

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that

ground, or what we consider as intended, that the service be set aside."

Harkness v. Hyde, 98 U. S. 476 at 479.

It is otherwise where a statute or general rule so provides, allowing time after special objection to make defense,

York v. Texas, 137 U. S. 15;

but no such statute or general rule is known in Michigan, where it is held:

"A special appearance for the purpose of moving to dismiss is not a submission to the general jurisdiction of the court. *Weber v. Wayne Circuit Judge,* 217 Mich. 561."

In re Parker's Estate, 268 Mich. 79 at 81.

And any discussion of the merits into which Joseph Metzinger may have been led while inquisition was being imposed upon him without benefit of legal counsel did not waive the special appearance objecting to the court's jurisdiction:

"The benefit of the qualified appearance by defendants at the time of filing pleas to the jurisdiction is not waived by arguing the merits of the case as disclosed by the bill on the hearing as to the sufficiency of such pleas, where there was no motion for dismissal of the bill for want of equity, and the discussion of the merits was permitted or invited by the court in order that it might be informed on that question if it concluded to consider the merits along with the question of the sufficiency of the pleas."

Citizens' Savings & Trust Co. v. Ill. Cent. R. Co., 205 U. S. 46, headnote No. 2.

Nor was the attorney whose special appearance was entered for the purpose of objecting to the jurisdiction there-

by authorized to receive generally the process of the court, at least in absence of some special showing of a reason for substituted service and proper order accordingly:

> "If it be admitted that substituted service . . . is sufficient to give the court jurisdiction to render a personal judgment . . . it can only be where the condition upon which such service is permissible is shown to exist."
>
> *Settlemier v. Sullivan,* 97 U. S. 444 at 447.

And see quotation above from *Reynolds v. Stockton* at the close of Federal Point No. 1 herein.

Therefore the alleged service upon said attorney (R. 112; R. 66) of the order referring said litigation to the prosecuting attorney (R. 42) Friend of the Court Edward Pokorny, to be heard, was no notice to the defendant appellant.

It would appear clearly therefore that the defendant appellant has had no due notice whatsoever either of the action on behalf of Louise Metzinger as plaintiff, or of the action on behalf of the sovereign power concealed behind her action as the maintaining barrathous agency; and under the 14th Amendment the entire proceeding below was void *ab initio.*

Yet all these omissions of due process are cured and "fully justified" by the Friend of the Court Statute, holds the Michigan Supreme Court, in the passage discussed and analyzed herein at pages 20 and 21.

3.

PENALIZATION FOR CHALLENGE OF COMMANDED AMERCEMENT

Although Joseph is described by the court (R. 37) as "obviously decent," and no delinquency—"Contempt pro-

ceedings: None" (R. 115)—has been pretended against him (R. 10-11) arising from the satisfied (R. 8) decree formerly granted his wife in 1931 (R. 6-7); his petition (R. 12-15) for custody and services of his nearly mature able-bodied son (R. 114; R. 67), filed in response to an extortionate demand Apr. 25, 1942 (R. 22) by the prosecuting attorney, was dismissed by the trial court (R. 74) without permitting any hearing in court thereon.

It was dismissed notwithstanding it stood fully at issue by answer (R. 16-17) with notice thereof in usual form to the court by praecipe No. 48509 (R. v.), and that a motion to refer said matter at issue to the said prosecuting attorney Friend of the Court Edward Pokorny had been dismissed (R. 19-20; R. 25) by an order which was never urged for review, and which was founded upon a fair hearing in open court and the undenied averment of said Joseph Metzinger (R. 21-4) that said prosecuting attorney was disqualified as a referee master in chancery by his precommitted barratrous stirring up of the petition against the defendant appellant, and financial interest in the outcome thereof.

Michigan Public Act 412 of 1919 as amended was interpreted to authorize denial, and the trial court did deny (R. 71), to Joseph Metzinger all "right to make a record" in the matter of his petition, systematically compelling him without due process to remain unheard subject to the extortion of the prosecuting attorney demanding indefinite amercements subsequently established (R. 114; 116) at $262.50, subject to the penalty if he attempted judicial test of the reasonableness thereof to have added thereto a further indefinite imposition enforcible by imprisonment (*In re Lupu*, 285 Mich. 500)—afterwards established (R. 11) as a support wholly uncompensated for said son in the custody of said Louise for another year until he became

seventeen years of age. His actual penalty for attempting by appeal to test the reasonableness of said prosecuting attorney's decree appears by mutual conspiracy between said prosecuting attorney and the trial judge (R. 56-58; R. 45-52; R. 91-2; R. 119) to have been fixed by the final order affirmed of said trial court (R. 74), raising said demand to $300.00 plus costs and a continued indefinite figure provided to be: "Ten ($10.00) Dollars per week . . . until the further order of the court," in place of the requirement of said ancient divorce decree fixed (R. 7) at "Five Dollars ($5.00) per week."

This penalty and denial of access to any court to test the valid reasonableness of said prosecuting attorney's decree, or denial of any access of which the defendant appellant might safely avail himself, is wholly void as a violation of the 14th Amendment; and objection thereto was immediately entered and preserved: (R. 3-5, grounds of appeal II and III; B. ii and iii, questions IV, V, VI, VII, and VIII; B. 154; B. 155-8; B. 159-168; B. 168-234; P. 2, preamble, and final paragraph of division I on p. 3; P. 7-8, division V).

The interpretation by the Michigan Supreme Court of the challenged Friend of the Court Act, Michigan Public Acts 412 of 1919 as amended, as authorizing the Friend of the Court to hold the defendant appellant required to obey his demands for capricious sums of money in the purported interest of Louise Metzinger upon charitable or other consideration, and subject to be heavily penalized if he undertake to test the reasonableness of such demands, is a denial of due process. It denies the defendant appellant under said interpretation of the statute any hearing whatsoever elsewhere than before said prosecuting attorney Friend of the Court, both as to the action against him, and as to his own action instituted by him to recover

the custody and services of his nearly mature son. The court interpreted said statute as excusing it from any hearing except on an appeal called "objections," and regarding which the rule applied was that respecting appeals in purely discretionary matters. The penalty applied upon any test attempted was not merely prohibitory, but a complete deprivation of due process.

That jurisdiction and duty of this court to hear an appeal based on a challenge of the Michigan Friend of the Court Act as being a repudiation of the 14th Amendment would seem clear, as an appeal of right, has been already touched upon.

> *Martin v. Hunter's Lessee,* 10 U. S. (1 Wheat.) 304.

The ruling of the Wayne Circuit Court in Chancery (R. 71) that the defendant appellant "demands the right to make a record in this court. This demand has been denied," and thereupon entering an order requiring of the defendant in place of the original $262.50 (R. 114; R. 116) the sum of an attorney fee and $300.00 plus $10.00 a week "until the further order of the court" (R. 71; R. 74), makes particularly applicable the ruling of this court:

> "In the light of this unbroken line of authorities, therefore, a statute like the one here involved—under which penalties of $5,000 a day could be imposed for violating orders of the commission—would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself."
>
> *Wadley Southern R. Co. v. Georgia,* 235 U. S. 651; 35 S. Ct. 214 at 219.

Noting the financial and economic character of the defendant appellant whose earnings when the divorce was

granted Louise Metzinger amounted to $22.80 per week as a factory hand (R. 115), one may reasonably doubt the safety of his attempt to test the reasonableness of the demands made upon him in view of the discretionary power of the court to penalize him. Being in chancery, purportedly, the court was in position to levy upon him such heavy fine as it may please for the purported benefit of supposedly charitable need. Actually, however, the interest of the court officer, the elective judge, in maintaining the prestige and power of the election machinery constructed by the judges in utter contempt for the provisions placed by the people in their constitution, for the purpose of keeping in their own hands unencumbered the power of election and an executive machinery independent of the judiciary, discloses the concern of the elective judge to judge his own cause. The prestige of the Friend of the Court machinery among organized and allied social workers throughout the state was an important factor in the strength of that election machinery to be maintained at all costs. Those allied social workers' organizations possessed invaluable influence with wealthy and influential elements interested in charitable activities, and of immeasurable potential value at election time. These points were extensively discussed below (B. 53-64; B. 67-83; B. 83-151; and note pp. B. 79, 80, and 104; B. 223-234), and would seem to easily explain the excessive penalty applied to this modest wage-earner for his attempt to test the reasonableness of the executive demands upon him. It was obviously anything but safe for him to attempt his test.

Where the defendant appellant has been denied access to a court for the hearing of his cause, he has been denied due process, and the Wadley Southern R. Co. case just quoted above excellently sustains Judge Cooley:

"A party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether this delegation be by the courts or by legislative act devolving judicial duties on ministerial officers."

Cooley's Constitutional Limitations, 7th ed., p. 589.

"One who is denied access to the courts for the enforcement of his rights, the redress of injuries, or for his defense against claims made upon him, is deprived of his property without due process of law."

Black on Constitutional Law, 4th ed., Sec. 234, p. 618.

This court therefore should reverse the holding below, and issue its mandate requiring a due hearing on the petition of Joseph Metzinger for the custody and services of his son, which the court below dismissed without a hearing.

4.

COMPETENT, IMPARTIAL, DISINTERESTED, AND UNBIASED TRIBUNAL DENIED

At every move of defendant appellant relative to the instant cause, he has been impelled and aggravated by the implicit partisan and interested bias against him of the incompetent tribunal substituted, by Michigan Public Act 412 of 1919 as amended, in place of the constitutional Wayne Circuit Court to rule over him,—a financial interest based inescapably in the licensed monopoly over a narrow field of litigation open to unlimited exploitation by political charity and solicitous barratry, of which the

defendant appellant has twice been made the helpless victim (R. 36).

His first step following the said prosecuting attorney's demand upon him for unauthorized funds (R. 22-3), April 25, 1942, constituted a repudiation of the court's authority under said statute to subject him to the incompetent rule of the court's vice-regent or referee, said prosecuting attorney entitled Friend of the Court Edward Pokorny. That response was his own petition at once ordered to be prepared and filed (R. 12-14) for the custody and services of his able-bodied son now of almost military service age and past fifteen years old (R. 114).

That petition duly noticed with common order to plead (R. 15) was joined at issue by answer duly filed (R. 16-17), and promptly praeciped (R. v) July 24, 1942, for a trial not in the office of said vice-regent or prosecuting attorney, but in the open circuit court itself. However said prosecuting attorney accomplished by barratrous importunement a decision by Louise Metzinger of her own cause against Joseph Metzinger by her void affidavit that she herself personally had handed to Joseph Metzinger copy of a motion hastily filed in her own behalf reviving the ancient divorce action (R. 9-11; R. 17-18) purportedly authorizing action by said prosecuting attorney under the Friend of the Court statute and parallel court rule 7-e. Joseph Metzinger in repeated affidavits has disputed that alleged service (R. 27-32; R. 44-55), disowning any knowledge of that motion except such as a postal card (B. 97) (supposedly informing him of disappointing prospects relative to his own petition, and which he passed to his attorney), induced that attorney to discover in the file, permitting thereby special appearance (R. 27; R. 28-32; R. 33) contesting the jurisdiction of the court relative thereto.

In further effort to confuse the action of Joseph Metzinger under the authority of said challenged statute and

Friend of the Court, said officer arranged to be filed by his *alter ego* (R. 23; B. 9; R. 19-20) a motion to compel the reference of defendant appellant's litigated troubles to said Friend of the Court. This motion on due hearing (R. v) was dismissed (R. 25) in consideration of the sworn response by defendant appellant (R. 21-4) relying upon the disqualification by partial, biased, pre-committed interest of financial nature on the part of said Friend of the Court involving his alliance through said *alter ego* with the powerful political machinery of organized social workers mutually essential to the re-election of the judges of the Michigan Circuit Courts and the Michigan Supreme Court to their emoluments of office, and to the retention of said Edward Pokorny and his staff in their salaried offices, and dependent for its profitable continuance upon the protected monopoly licensed by said challenged statute; barring thereby any reference of said litigation to said prosecuting attorney serving as master in chancery. By said order so adjudicating that issue, of which no review was ever notified or attempted, the cause then stood on said praecipe ready for trial in open court before a competent tribunal. Substitution of attorneys for Louise Metzinger was at once arranged (R. 26).

Then said prosecuting attorney undertook without any formal order of reference to strong-arm his intervention in said matter contrary to the local court rule 7-i (B. 250), by aid of a judge wholly unknown except nominally (R. 7) to the cause, but who subsequently disclosed his said interest and partisan bias (B. 223-234) in his manner and language pre-judging the petition brought before him by said prosecuting attorney's recommendation (R. 116-7) dated November 27, 1942, which is conceded in the Brief for Louise Metzinger, Appellee, filed with the Michigan Supreme Court, at page 3, never to have been actually

filed in the record although a notation of its filing appears in the calendar as of the hearing day (R. v) December 4, 1942. Consequently it was without any opportunity whatsoever for knowledge thereof that defendant appellant's objection to jurisdiction on special appearance (R. 27-33) was prepared and at that hearing filed (R. v). Therefore, since copies of the reports are never furnished, the objections filed could not, and did not purport to, touch upon anything in that report. There was as yet nothing to suggest the challenged statute to defendant. But nevertheless all parties agree the essential issue is the constitutional validity of said statute and parallel court rule (R. 93; B. 29; P. 2; Brief for Louise Metzinger, p. 5; opinion of Michigan Supreme Court (R. 122).

At the first intimation of those hastily prepared objections (R. 33) the trial court then ruled refusing to permit oral argument or aid of counsel except by such matter in writing as might later be filed; and at that same hearing so conducted entered its ruling (R. 39) "heard and submitted."

In compliance with said permission relative to the contest over jurisdiction a second statement somewhat more carefully presenting the objections (R. 44-55) again urged lack of jurisdiction to subject the defendant appellant to such disqualified referee (R. 48, par. 7; R. 49-51, par. 9, 10, 11, and 12), in said paragraph 9 citing the 14th amendment and objecting that such reference "seeks to deny him a right to the determination of this matter by an impartial and unprejudiced tribunal." That statement, required by Wayne Circuit Court Rule 7-e (appended hereto) to be notified the day before presentation at the return of the recommendation by the Friend of the Court, was duly notified and filed (R. 65; R. 44; R. v); but no pretended hearing was upon that occasion permitted

other than that filing. Decision of the issue of jurisdiction was thereafter rendered by the opinion of the trial court (R. 69-72) filed February 16, 1943, and the order of the trial court finally determining said litigation (R. 73-4) filed March 5, 1943, after a judicial investigation of the issue of jurisdiction conducted by the trial court, as defendant appellant subsequently (R. 59) discovered, aided by the facts and arguments presented by said prosecuting attorney at a hearing from which defendant appellant was excluded (R. 45-52; R. 56-58; R. 59; R. 91-2; R. 119).

Objection, that to subject defendant appellant to a tribunal so obviously partisan, interested, and biased, constituted a denial of due process, was urged again on appeal (R. 3, ground II (a); R. 4, ground III (a), (c), and (d); B. ii, question V; B. iii, question VII; B. 181-205; and quite generally throughout the brief; P. 7-8, division V).

This challenge was in fact the burden of the entire contest below. No hearing was permitted either of the action against Joseph Metzinger, or of his own petition for the custody and services of his nearly mature son, before any other tribunal than that of the friend of the court, provided by the statute and court rule challenged.

4-A.

AS TO THE PARTISAN NATURE OF THE FRIEND OF THE COURT

It would seem sufficient that the Friend of the Court is both a prosecuting attorney and a master in chancery, a prosecutor and a judge, an advocate and an umpire, in the same matter, without adverting to his interest financially, or as an operator of an election machine deemed essential to their re-election by the circuit judges.

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."
>
> *Tumey v. State of Ohio,* 273 U. S. 510 at 534, citing cases.

The temptation placed by said statute not merely upon the elective judges, sought to be relieved of onerous duties in a field of high emotion sown thick with infinite discretionary dilemmas, transferred by that statute as interpreted upon the appointive Friend of the Court, would seem sufficient to void the statute:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law."
>
> *Tumey v. St. of Ohio,* 273 U. S. 510 at 532.

It is doubtless sufficient if the defendant, who is prosecuted either openly or by concealed processes in the public behalf, be granted a fair hearing on the merits at some point in the progress toward finality when he cares to defend that far. Whether presumption of guilt can be legally substituted for presumption of innocence by postponing in the progress of the cause such fair hearing may yet be debatable.

But the uneasiness of public opinion on the point seems evident from the popular silent rebellion offered among the reasons in the petition for review here, at pp. 19-24, and demonstrated by perhaps the most remarkable fall in

national birth rates known to history,—there merely cited, but hereinafter at pp. 70 to 74 explained by aid of statistical charts and graphs.

A more philosophic few, however, are clearer in their grounds of protest, and are flooding the market with protesting publications against so-called administrative law, —citing only two:

> "To employ the terms administrative 'law' and administrative 'justice' to such a system, or negation of system, is really grotesque."
>
> *The New Despotism,* Chief Justice Hewart (England, 1929), p. 44.

In the chapter containing that statement a practice almost identical with that appealed is seriously questioned. President Henry M. Wriston of Brown University similarly critizes in a heavily documented work, chapter on "Administrative Management":

> "A recent president of the American Bar Association, Arthur T. Vanderbilt, pointed out that not infrequently counsel for a commission '. . . drafts rules and regulations for his commission, directs an investigation, files a complaint in the language of an outraged plaintiff, presents evidence to the commission to support the complaint, writes the opinion of the commission sustaining the complaint of his outraged plaintiff in judicial language adapted to the pertinent decisions of the court of last resort, and in event of appeal, moves heaven and earth to prevent a review of the facts.' "
>
> *Challenge to Freedom,* 4th ed. (1943), p. 122.

In actual fact this has been the procedure of the particular bureau or administrative commission known in Michigan as the Friend of the Court, in his conduct of matters in the instant case appealed.

And note a remarkably fine study by Professor Ludwig Von Mises, showing the necessary service of bureaus that cannot be otherwise performed:

> *Bureaucracy,* (1944—Yale University Press), 125 pp.

But the statute challenged is interpreted to deny any hearing before any other officer than the prosecuting attorney to whom it is referred (R. 71); and the Michigan Supreme Court, holding (R. 121-2) that a hearing in court on the point of jurisdiction was sufficient, and there informing defendant (R. 122) "as to the action the trial court would take," sustained the practice administered, by which it was ruled (R. 71) that no hearing whatsoever was due the defendant on the merits beyond that before the prosecuting attorney. The statute so interpreted repudiates the 14th amendment.

The principle is general in every field:

> "A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge, and does not afford due process of law."
>
> *Commissioners of Union Drainage District v. Smith,* 223 Ill. 417, 84 N. E. 376; 16 L. R. A. (N. S.) 292.

The Friend of the Court insists, indeed, that defendant appellant has had his hearing in open court. In his Informal Statement and Brief of Friend of the Court, at p. 2, responding to the defendant appellant's Application for Re-Hearing and Affidavit in Support Thereof, the Friend of the Court says of the defendant, "He appeared in Court and was heard by the Court. THIS IS A HEARING IN COURT. This procedure is a complete refutation of the charge of the attorney that the Friend of the Court is an

advocate, umpire, public prosecutor and judge, and permitted to the appellant no hearing before any other person or tribunal,"—capital letters his.

But he does not there indicate any occasion to which he refers. Actually he refers to the only occasion when the defendant appeared in court, appearing specially to object to jurisdiction (R. 33), and to which hearing he was additionally commanded by the court under penalty (subpoenaed) for the purpose of furnishing testimony (R. 34), on that page owned by the Friend of the Court, but elsewhere (R. 40) attempted to be owned by the attorney in the civil action between Louise Metzinger and Joseph Metzinger on her petition. It was at that hearing that protection by counsel was denied the defendant by the court (R. 33) except such written matter as he might care to file. And the court insisted on depriving the defendant of that protection (R. 37). Following that hearing, and without any further hearing except such as was offered in the office of the Friend of the Court out of the presence of the court and judge, the court ruled (R. 71) of the defendant that he "demands the right to make a record in this Court. This demand has been denied."

The Friend of the Court is obviously in error in urging a hearing in open court was had. The Michigan Supreme Court ruled (R. 122): "As above noted, defendant was timely served with a copy of plaintiff's petition and notice of the time and place of hearing. This is all that is required under the rules and practice of courts in this jurisdiction. Further, the defendant was not, by the reference to the friend of the court, deprived of a hearing before the trial court. Instead a full and fair hearing before the court was afforded defendant as to the action the trial court would take in considering the recommendations of the friend of the court, and such testimony as the trial court might see fit to take."

That restriction on the hearing is clear: ". . . as to the action the trial court would take . . ." not with respect to any hearing on the merits in open court, but only with respect to whether the report of the friend of the court would be filed and considered. The Supreme Court was not deceived by the strenuous efforts on the part of the Friend of the Court to prevent a review into believing that any hearing in open court on the merits had been held. The language of the friend of the court quoted above appeared only after the opinion of the Michigan Supreme Court was filed, and so could not be supposed to have deceived the court. Prior to that statement no such claim or pretense appears anywhere in the record. The Michigan Supreme Court obviously relied on the opposite language used by the trial court (R. 71) refusing a hearing in open court.

Earlier in the opinion appear the words (R. 121): "The circuit judge heard the parties relative of their respective contentions . . ." But that sentence refers to the sentence immediately preceding, and so is limited to the issue of jurisdiction: "At this stage of the proceedings defendant's counsel appeared specially before the trial court 'for the purpose of presenting objections to the Recommendation of the Friend of the Court in re petition filed in the above entitled cause by Louise Metzinger denying jurisdiction of the court over the person of defendant Joseph Metzinger in the matter of said petition to grant any of said recommendations,' basing such objections upon reasons theretofore served upon plaintiff's counsel and upon the friend of the court." Since the trial court itself had ruled of the defendant that he (R. 71) "demands the right to make a record in this Court. This demand has been denied," it would appear that the interpretation of the challenged Friend of the Court statute by the Michigan Supreme Court was identically that of the trial court;

namely, that no hearing on the merits was required under the statute challenged other than that before the Friend of the Court, from whom appeal might be had as from any discretionary ruling upon filing "objections." But appeals from discretionary rulings require a showing by appellant, that beyond all possible doubt the power of discretion has been abused. The burden is thereby shifted from the prosecuting attorney prosecuting one accused of a tortious wrong against the People to the defendant himself under accusation of crime. He is presumed guilty and must prove himself innocent beyond reasonable doubt. A more perfect opportunity for abuse of governmental power could not be conceived.

4-B.

AS TO THE FINANCIAL INTEREST OF THE FRIEND OF THE COURT

As to the financial interest disqualifying the Friend of the Court from acting in either judicial or quasi-judicial capacity with regard to the matter litigated, it should be sufficient to refer to the unappealed determination (R. 25) by a judge in open court who was well informed on the subject not meredy as a member of the court in question, but upon full and frank presentation of the issue (R. 19-24). The biased and interested attempt of the associate judge, by whose aid the Friend of the Court undertook to strong-arm his way into the picture despite that unappealed determination, to ignore and by-pass the order of Judge Moynihan by a judicial process concealing from Joseph Metzinger and his attorney the representations of fact and argument solicited on the point of jurisdiction, is merely additionally convincing. The subject was extended, however, on appeal to the Michigan Supreme Court (B.

103-5) where mention is made of Dr. Emanuel M. Josephson's recent work cataloguing rackets:

> *Your Life Is Their Toy—Rackets, Social Service and Medical* (1940).

That work emphasizes heavily the fertility of the charitable field for wholesale racketeering by powerful political organizations, with photostated documents and statistics voluminously supporting his presentation. And the danger of political charity is today becoming quite generally recognized as books multiply by scholars at work studying in the field. Among those most publicized perhaps is one quoted for the aid of the court below at a yet further discussion of this point (B. 171), emphasizing the degree of financial interest held by the Friend of the Court in the litigation before him:

> *Bureaucracy Runs Amuck,* by Sullivan.

The habitual "practice . . . generally" (R. 90) by which the Friend of the Court excludes the defendant (R. 91-2) by court approval from the judicial investigation of his matter under the supposed authority of the challenged statute and court rule should be sufficient to demonstrate the need of correcting the practice generally. Denied right to be present, he has been denied a day in court.

All the defendant appellant has demanded is a trial of his matter publicly in an open court before a competent, disinterested, impartial, and unbiased judge. Thus only can he be assured of reasonable human honesty on the part of those with power in their hands. Human nature does not like to be dishonest publicly.

This is the due process that has been defined by the Northwest Territorial Act, promised by the Michigan Constitution, and guaranteed by the 14th Amendment. All

that remains is to compel respect for those rights by the officials.

Ordinance of the Northwest Territory, Art. II of Sec. 14;
Mich. Const., Art. II, Sec. 16; Art. IV, Sec. 1 and 2; Art. VII, Sec. 1, 5, 6, 11, and 21; Art. VIII, Sec. 3;
U. S. Const., Amendments, Art. XIV, Sec. 1.

Financial interest of the licensed practical monopoly in such a fruitful field is too well understood by the general public, as evidenced by the falling birth rates, to occasion any very great doubt, even though no opportunity was available or permitted (R. 41) to actually disclose the facts by legal evidence. The effort of appellant's attorney futilely (R. 41) to enter that field would seem sufficient demonstration of its fertility.

The right of a litigant, and of the defendant appellant, to an impartial, disinterested, competent, and unbiased tribunal would seem so fundamental as to need no aid by cited authorities, but this court has had occasion to rule upon the point directly:

> "Courts cannot too carefully guard against any attempt of an interested judge to force himself upon litigating parties, and should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for the determination of his rights."

McGuire v. Blount, 199 U. S. 142; 26 S. Ct. 1 at 2.

It may perhaps be plausibly argued that the *Tumey* case refers only to "a direct, personal, substantial pecuniary interest" on the part of the official,

Tumey v. Ohio, 273 U. S. 510 at 523;

and does not cover such an indirect case as that of the friend of the court.

It is true, that no opportunity was permitted for introducing testimony on the full degree of financial interest whereby one might calculate the actual dollars and cents involved. Nor could a litigant in such sub-mediocre economic situation as that of the unskilled factory employee earning $22.80 per week at the time of the original decree (R. 115) sustain the printing of such a record. And it is true that a meticulous deference to logical demonstration of legal or mathematical perfection would require a financial outlay far beyond the means of an ordinary private citizen.

But need of the government, for courts in which the public have reasonable faith, is far more important than deference to a technical exactitude where there appears a general public opinion that the courts are in some special field dishonest and tyrannical. The measure of that need is the reaction by the public,—in the instant cause being the statistics in this brief offered at pp. 70 *et seq.*

When the legal profession see evidence of failing faith in the courts on the part of the public, and the substitution of reactions that must eventually destroy the government served by those courts, it is a mere duty of conscience to bring that evidence into the courts and maintain it there until it has been examined by the final authority.

4-C.

AS TO BASIS OF BIAS DISQUALIFYING THE FRIEND OF THE COURT

The personal bias of a judge is not a federal issue, except as it can be accurately traced to partisan interest.

> "Matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be

matters merely of legislative discretion. *Wheeling v. Black,* 25 W. Va. 266, 270."

Tumey v. Ohio, 273 U. S. 510 at 523.

The partisan interest claimed as a basis of that bias in the present matter lies in the need for alliance of the organized social workers for the maintenance of an election machine to assure re-election of the judges to office. Professional charity in the interest of women and children has merely been organized into the political instrument, through the agency of the Friend of the Court under the authority of the challenged statute.

In the instant matter the failing faith of the public in the courts which deal with matters of divorce and domestic relations appears to be evidenced by an historically remarkable fall in birth-rates of serious import to the nation at large. The subject has been alluded to in the reasons bound with the printed petition for review explaining why review should be granted. Those reasons appear rooted in a violation by the local courts of the nation of the principles requiring disinterested, impartial, and unbiased courts, to the realization of which the genius of the law has devoted several centuries. That genius is driven, however, by considerations not even concerned with technical points of law, but with the demands of the people at large. To the layman, rather than to the lawyer, one may reasonably look for the most pertinent statements of the basic needs involved.

Perhaps Sir James Bryce has best pointed the perils involved in supplying an organization armed with alliances in political fields with unlimited funds (as out of the pockets of husband defendants subject to discretionary imprisonment for enforcement of amercements supposedly required to sustain loyalty of the people toward organized

social service agencies and their numerous organizations of social workers). Taxes for salaries of those social workers are a minor and wholly inconsiderable element in the basis of bias. That certainly applies to the Friend of the Court himself. His real bias is far deeper than any mere salary. It is in fact rooted in an atmosphere of philosophy in which social workers live and rationalize their whole activity. The practical and political weight of that atmosphere is excellently appraised in a passage of Lord Bryce's work quoted (B. 80) for the benefit of the court below, and here mentioned.

> *The American Commonwealth,* 1916 ed., p. 407—by James Bryce.

And perhaps one may be pardoned for quoting a footnote in that outstanding work on sociology only recently translated into English, written some quarter century ago before his death by one known throughout the world today for his far-sighted analysis:

> "The placing of homeless children is a well-known device for influencing elections. It is cynically practiced, and oftentimes admitted."
>
> *Vilfredo Pareto,* in his *Treatise on General Sociology,* English title: The Mind and Society, translated under sponsorship of Prof. James Harvey Rogers of Yale (Political Economy), 1935, Vol. III, Sec. 1714, Note 1.

It is not merely public faith in our judiciary that is at stake, so obviously demonstrated by the statistics recently published, and to which reference has herein repeatedly been made touching the field of divorce, and birth rates. Prof. Arthur J. Todd of Northwestern University, reviewing for the American Bar Journal that statistical work,

from which the graphs below are reproduced, commends the study for

> ". . . its vigorous statement of a point of view which may easily be obscured by fogs of sentimentality and false humanitarianism."
>
> *Am. Bar Jour.,* August, 1940, p. 681.

And Prof. Richard H. Heindel, of the University of Pennsylvania has characterized the work,

> "A study of the efforts of social workers to lighten the burdens of those who found the problems of marital adaptation beyond their ability to solve, and of the unfortunate damage which appears to result from those efforts."
>
> *The Social Studies,* May, 1940, p. 239.

Not merely the public faith in our judiciary is at stake we say again, but the very security of the nation itself when at the end of the generation now being born we discover an insufficient defensive population against the rising consciousness of the Pacific interests.

It is not unnatural, however, that self interest should rationalize attitude upon the basis of charitable considerations, which in fact result in most terrible punishment a generation later. Only those not involved in the atmosphere of such rationalization are free to judge the perils disinterestedly. If the trial judge and the Friend of the Court are deceived and misled by their quite understandable charitable desires, and have evidenced the remarkable bias and prejudice illustrated (B. 223-244), that is not ground for any personal criticism whatsoever. It is merely evidence of their human weakness. Their advantage from the involvement of election campaigns does not mean that they are necessarily conscious of their very possibly unconscious rationalization. But the public and the nation are none the less the inevitable victims.

It is notable, however, that the charge and discussion (B. 79-81; B. 239) in this particular of interest involving election machinery was implicitly admitted and confessed by the Friend of the Court by his side-stepping the topic in his Brief for Friend of the Court responding to the Brief for Joseph Metzinger, Appellant; and that he ignored the topic even in his subsequent pleadings or briefs, notwithstanding the emphasis in the Reply Brief for Joseph Metzinger, at p. 5, that he was guilty of

> ". . . ignoring completely . . . the statistics and discussion showing the incalculable public damages flowing from the methods, practice, interest, and fruits of his office, and almost incredible increase in family disruption directly resulting therefrom, together with the phenomenal effect on birth rates, now recognized with growing public uneasiness to threaten seriously the national security in a few years (statistics which, thus conceded, should particularly deserve the attention of the Supreme Court)."

Interest, partiality, and bias, would therefore seem the obvious cause of the injustice in the particular case, and of the general reaction on the part of the public of which the nation at large is the victim. The public merely react against evidences of incompetent government. Obviously a tribunal that is interested, partial, and biased, is incompetent. A litigant subjected "to the control of one whose interest it will be to decide arbitrarily and unjustly" is placed "out of the protection of the law."

Cooley's Const. Lim., 7th ed., p. 594.

> "No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in it-

self; for *jura naturae sunt immutabilia,* and they are *leges legum.'*

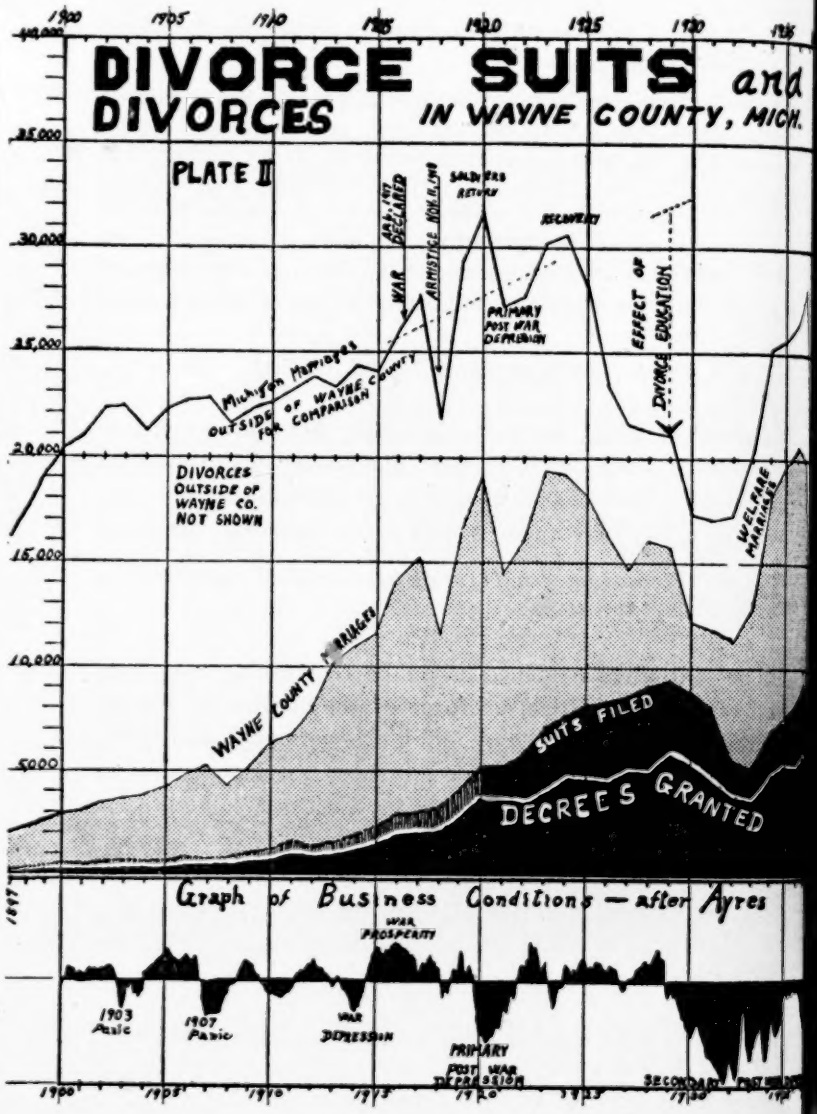
"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the question."

Cooley's Const. Lim., 7th ed., p. 592.

Judgment by an interested, partial, and biased tribunal is therefor so completely void that one affected by its judgment is not bound to raise the objection at first opportunity, but may raise it first in the appellate tribunal.

Peninsular Ry. Co. v. Howard, 20 Mich. 18, citing authorities.

The statistical evidence of public reaction to the violation of natural justice, by force of the challenged Friend of the Court statute and similar enactments and practices in other states, has already been mentioned, and is here presented.



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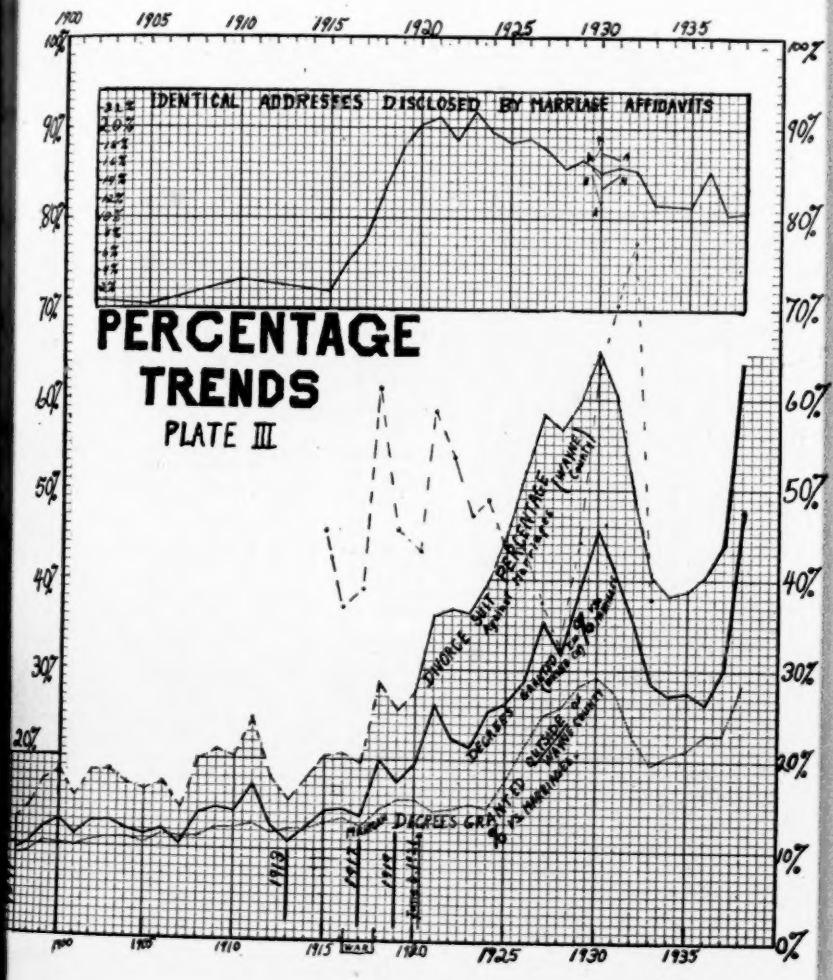

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MARRIAGES, DIVORCE SUITS, and DIVORCES PLATE I
(Annulments are treated as divorces)

Year	Marriages recorded in Mich.; figures by Mich. Dept. of Health.	Divorces granted in Mich. figures by Mich. Dept. of Health.	Marriages recorded in Wayne County; --Mich. Dept. of Health.	Divorces granted in Wayne County; --Mich. Dept. of Health.	% vs. M	Divorce suits started in Wayne County,- from various sources of information	THESE COLUMNS BY CALCULATION Percentage of divorce suits filed in Wayne County, vs. Marriages	Marriages recorded outside Wayne County (out-state)	Divorces granted outside Wayne County.	% vs. M
1897	18,879	1,656	2,222	200	9.4	1856	83.9	16,357	1456	8.9
1898	20,138	1,901	2,444	249	10.2	2056	84.5	17,694	1652	9.3
1899	21,877	2,328	2,677	325	12.1	2361	88.2	19,200	2003	10.4
1900	23,295	2,435	2,930	382	13.0	2585	88.2	20,365	2053	10.1
1901	24,079	2,440	3,066	350	11.4	2500	81.5	21,013	2090	10.0
1902	25,653	2,828	3,424	444	12.9	2834	82.5	22,229	2384	10.7
1903	26,029	2,945	3,673	478	13.0	2932	79.8	22,356	2467	11.0
1904	24,918	2,606	3,759	454	12.1	2698	71.8	21,159	2364	11.1
1905	26,307	2,825	4,134	484	11.7	2871	69.4	22,173	2341	10.6
1906	27,519	3,192	4,839	585	12.1	3235	67.3	22,680	2607	11.5
1907	27,940	3,107	5,151	530	10.3	3157	61.3	22,789	2577	11.3
1908	25,765	3,020	4,249	597	14.0	3252	76.5	21,516	2423	11.3
1909	27,363	3,516	5,121	752	14.7	3874	75.6	22,232	2764	12.4
1910	29,039	3,716	6,368	905	14.2	4294	67.4	22,651	2811	12.4
1911	29,859	4,125	6,663	1,140	17.1	4639	69.4	23,176	2985	12.9
1912	31,694	3,836	7,931	999	12.6	4921	62.0	23,763	2838	11.9
1913	33,529	3,978	10,162	1,105	10.9	4598	45.2	23,367	2873	12.3
1914	35,316	4,395	10,987	1,383	12.6	4971	45.2	24,329	3012	12.4
1915	36,527	4,757	11,524	1,644	14.3	4399	38.2	24,003	3113	13.0
1916	40,143	5,540	14,151	2,064	14.6	4760	33.6	25,992	3476	13.4
1917	42,791	5,627	15,166	2,114	13.9	5010	33.0	27,625	3513	12.7
1918	33,260	5,493	11,534	2,301	20.0	5395	46.4	21,726	3192	14.7
1919	45,579	7,469	16,414	2,880	17.5	6720	40.4	29,165	4589	15.7
1920	50,805	8,679	19,090	3,715	19.5	8227	43.1	31,715	4964	15.7
1921	41,508	7,676	14,474	3,766	26.1	8200	56.6	27,034	3910	14.4
1922	43,561	7,591	16,961	3,582	22.3	8903	52.6	27,510	4009	14.6
1923	49,569	8,745	19,394	4,178	21.6	7066	36.4	30,175	4567	15.1
1924	49,766	9,400	19,203	4,878	25.4	7658	39.8	30,565	4522	14.8
1925	46,276	9,650	18,133	4,746	26.2	8200	45.2	28,143	4904	17.9
1926	39,788	9,795	16,290	4,682	28.8	8472	52.0	23,498	5113	21.7
1927	36,276	10,617	14,719	5,221	35.4	8880	58.2	21,557	5396	25.0
1928	37,300	10,615	16,031	5,110	31.9	9083	56.6	21,269	5505	25.9
1929	36,816	12,094	15,740	6,129	38.9	9369	59.5	21,076	5965	28.3
1930	29,462	10,639	12,187	5,546	45.7	7908	65.1	17,355	5093	29.4
1931	28,656	9,507	11,783	4,807	40.8	7094	60.2	17,073	4700	27.6
1932	28,552	7,889	11,251	3,974	35.3	5532	49.1	17,301	3915	22.6
1933	33,132	7,671	12,968	3,707	28.6	5236	40.4	20,164	3964	19.7
1934	43,241	10,124	18,093	4,919	27.2	6948	38.4	25,148	5205	20.7
1935	45,313	10,844	19,703	5,414	27.5	7649	38.8	25,610	5430	21.2
1936	47,023	11,419	20,532	5,362	26.2	8311	40.5	26,491	6057	22.9
1937	47,954	12,472	19,836	6,002	30.3	8743	44.0	28,118	6470	23.0
1938	30,008	10,686	11,228	5,378	47.9	7184	64.0	18,778	5308	28.4

Hand-written figures in this column and the preceding column are not authoritative, being obtained by calculation from the number of divorces granted in Wayne County for the years prior to 1930; calculated upon the basis of presuming that divorces are granted in 70% of all suits filed, believed to be a fair approximation.

Borrowed from Rood's 1939 copyrighted work, "Matrimonial Shoals," Detroit Law Book Co., Detroit, Michigan.

PLATE IV

Data gathered from Marriage License Affidavits filed in Wayne County, Michigan. The selected key dates (or the next secular day, where the key date fell on a Sunday or holiday) are presumed to show a representative sample of the affidavits for the entire calendar year. Column "A" discloses the total number of affidavits of the key date examined. Column "B" shows the number of affidavits disclosing identical addresses for both parties,- calculated in percent at the foot of the column. Where "A" and "B" are in capital letters, the original affidavits were examined; where in small letters, the figures refer to the data appearing in the Detroit Legal News of issue on the key date, being a part of the data for 1930 and 1931, and all of the data for later years.

	1900		1905		1910		1915		1916		1917		1918		1919		1920		1921		1922	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Feb. 1	9	0	17	0	16	1	43	1	44	0	57	1	27	2	50	8	64	21	41	11	45	10
10	8	0	3	0	9	0	25	0	39	0	99	11	58	4	44	7	63	12	35	10	33	9
20	17	0	13	0	14	0	26	0	56	4	41	8	24	6	40	8	58	4	43	16	57	14
May 1	20	0	22	0	12	0	78	3	49	2	37	4	35	1	44	9	100	19	46	13	56	13
10	14	0	18	0	12	0	40	1	42	1	43	4	27	3	65	10	68	14	49	9	42	8
20	7	0	9	0	19	0	33	0	77	7	71	9	52	2	69	15	54	5	38	6	39	5
Aug. 1	8	0	8	0	26	0	54	0	36	0	52	1	29	4	59	11	72	21	70	9	44	11
10	3	0	6	1	26	0	36	0	43	0	38	0	63	15	71	14	49	16	50	10	55	9
20	8	0	17	0	23	1	30	2	61	0	64	2	48	5	53	16	50	9	74	15	93	12
Nov. 1	9	0	36	0	28	4	54	0	51	8	52	3	16	8	106	13	86	17	42	6	51	13
10	15	0	6	0	15	3	31	0	35	4	78	9	17	2	68	14	65	10	61	16	75	9
20	18	0	17	0	58	7	88	4	63	6	58	1	35	4	72	6	96	17	80	12	57	7
Total	136	0	172	1	257	16	549	11	597	31	662	53	431	56	741	131	815	166	631	133	649	120
%		0.0%		0.6%		6.1%		2.1%		5.2%		7.8%		13.0%		17.7%		20.2%		21.1%		18.5%

Second sample	1923		1924		1925		1926		1927		1928		1929	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Jan. 1	3	0	18	0	29	0	74	0	Feb. 1	46	8	44	8	61	15	66	17	47	12	46	8	46	8
10	8	0	13	0	23	0	30	1	10	95	24	69	18	47	9	42	8	40	11	35	2	64	10
20	4	0	4	0	15	0	37	0	20	38	12	56	13	28	5	34	7	66	11	41	4	24	6
Apr. 1	7	1	9	0	12	0	20	0	May. 1	45	8	64	7	59	8	83	11	68	14	59	6	44	8
10	7	0	7	0	30	0	63	0	10	74	15	90	19	66	20	71	17	50	10	52	5	38	7
20	10	1	6	0	28	0	30	1	20	77	18	63	18	75	13	64	14	31	2	88	15	119	24
Jul. 1	15	0	13	0	14	0	38	1	Aug. 1	61	12	57	13	116	18	110	26	94	15	42	8	65	10
10	18	0	16	0	15	0	66	6	10	141	25	77	15	100	16	79	7	50	4	57	10	93	17
20	1	0	9	0	21	0	34	0	20	103	22	65	10	65	17	89	11	112	16	113	23	77	12
Oct. 1	14	0	19	0	28	0	26	0	Nov. 1	57	8	98	18	104	21	67	19	51	12	36	7	47	6
10	20	0	19	0	19	0	49	0	10	99	28	89	13	64	9	55	6	89	9	93	16	58	6
20	13	1	8	0	23	0	24	0	20	65	15	68	9	43	6	67	14	55	15	62	8	49	9
Total	114	3	137	0	257	0	501	9	Total	901	196	834	162	870	159	837	157	743	131	734	112	727	120
%		2.6%		0.0%		0.0%		1.8%	%		21.8%		19.4%		18.3%		18.8%		17.6%		15.5%		16.5%
both.	250	3	309	1	514		1030	20	..Note: "both" refers to both samples added and calculated together as if one sample to reduce probability of error													
%		1.2%		0.3%		3.1%		1.9%														

second sample	1930		1931		first sample	1930		1931		1932		1933		1934		1935		1936		1937		1938	
	A	B	A	B		a	b	a	b	a	b	a	b	a	b	a	b	a	b	a	b	a	b
Jan. 1	45	6	44	14	Feb. 1	23	3	20	6	22	4	29	4	26	3	36	4	37	6	16	2	60	11
10	32	6	32	4	10	20	4	66	8	23	7	16	3	37	4	70	12	29	3	58	8	3	0
20	47	3	35	2	20	40	7	24	3	13	1	15	1	68	11	68	9	30	5	30	5	18	1
Apr. 1	26	6	23	4	May 1	26	6	37	6	22	2	26	4	119	11	79	6	30	2	74	14	34	6
10	35	9	30	6	10	22	3	51	12	59	5	32	1	42	6	60	4	60	18	52	4	19	7
20	58	10	64	9	20	151	17	45	4	52	8	38	6	67	7	49	6	86	15	78	7	32	2
Total	243	40				282	42																
%		16.5%					14.9%																
both	525	82																					
%		15.6%	for half year			A	B																
Jul. 1	35	10	35	4	Aug. 1	37	6	47	14	22	3	65	8	87	5	51	9	68	12	99	8	26	1
10	34	7	39	8	10	62	7	41	2	36	5	47	6	84	8	30	2	63	7	44	3	33	1
20	47	7	61	9	20	46	5	37	4	30	3	33	2	74	10	113	10	54	7	52	2	21	1
Oct. 1	24	3	51	12	Nov. 1	37	2	26	2	46	10	33	6	23	1	88	2	38	3	216	20	108	16
10	26	5	66	9	10	59	6	66	12	30	3	23	7	41	4	38	4	90	19	85	6	60	8
20	50	8	42	7	20	41	7	31	3	18	6	38	1	79	9	69	10	47	6	17	1	36	2
Total	418	40	512	65		462	33	511	76	373	57	395	46	687	79	693	76	634	97	760	60	582	56
%		18.3%		16.6%			11.4%		14.9%		15.3%		11.6%		11.5%		11.3%		15.3%		10.5%		10.7%
both	800	73																					
%		14.6%	for half year																				
year	461	60				564	75																
%		17.3%					15.3%																
both	1025	158	1023	161																			
%		15.1%		15.7%																			

Double samples were taken for 1930,1905,1910, and 1915 in an effort to reduce the probability of error that the small numbers involved would cause. Double samples for 1930 and 1931 were to check against and illustrate the range of error involved in relying upon the data found in the Detroit Legal News in place of original affidavit

Borrowed from Rood's 1939 copyrighted work, "Matrimonial Shoals," Detroit Law Book Co., Detroit, Michigan.

Attention is particularly drawn to the parallel nature of two trend lines; the ones representing the percentage of divorce decrees granted against marriages recorded in the State of Michigan outside of Wayne County; the other representing the same data for Wayne County alone; except as a divergence appears for the period from 1917 to 1924. The cause of that divergence was the subject of that book, and the conclusions of that analysis have never been seriously questioned. It is obvious that where the establishment of the practice appealed has accomplished after a three to four year educational period a rise in the proportion of wrecked families of such remarkable proportions approximating 300% to 400%, the co-incident rise by some thousand percent in the proportion of un-married cohabitations (known only as to those which finally did get married) is not a result to be ignored. The obvious fear, which has accomplished that change in assumption of responsibility, can only be interpreted as involving the judicial reform here under examination; and those who fear even to get married will very understandably carry that fear along subsequent to a marriage with regard to the responsibility of children. The near 50% drop in birth-rates nationally co-incident with the spread of this questioned reform cannot well be explained on any other basis. The involvement of the national peril a generation or so hence when a defensive population will be needed is not a matter that should be ignored by that department of the government which has permitted the elimination of due process and so imperiled the nation. But suitable and effective correction and supervision would seem not available to the nation except in the national Supreme Court.

It is notable that Maj. Gen. J. F. C. Fuller, discussing a comment by Mr. Harold Butler, British Minister currently in Washington, comments:

> "From what Butler has said, it is apparent that the next restriction will be sought in the creation of some kind of international police power. If so, then I am of the opinion that it will not last long, because, since human nature is as it is, the policemen will ultimately quarrel and the whole system will tumble down. . . . To base peace on police power, which is but another name for war power, is to make power a thing in itself with destruction or compulsion (moral destruction) as its sole aim." —*War Tides,* by Maj. Gen. J. F. C. Fuller, Newsweek, Mar. 5, 1945, p. 29.

The error of biased tribunals, and of statutes that so construct them as to necessarily make them interested, partial, and biased, is more than legal error. It is military error, where it affects birth-rates.

It is only fair to concede that a generous and highly charitable experiment has been conducted for a generation. But Judge Robert M. Toms, of the Wayne Circuit Court has warned us:

> "Somewhere every experiment should have some sort of terminal facilities. The period of fair trial to which every experiment is entitled does not mean eternity. Give it a day, or a year, or a century in court, if necessary, but somewhere, sometime, it ought to be *res judicata*—either an acceptable, sound, demonstrable fact, or a fanciful, unworkable fallacy. As a field for unlimited experimentation the body politic can endure just so much grief."
>
> *Michigan State Bar Journal,* January, 1932.

The penalty, if the experiment be not examined has been sufficiently touched upon (B. 176).

5.

DENIAL OF TRIBUNAL OPERATING BY KNOWN PRACTICE AND REGULARITY

The issue involving right of defendant appellant to that due process which is constituted by known and regular procedure arose in the instant cause from the mere fact that he declined and refused to submit to any consideration of the matters involving him by the tribunal established under the challenged Michigan Public Act 412 of 1919 as amended for lack of any known practice or rules of procedure by which that tribunal assures the litigant of any single element of due process. The lack has not been denied (R. 28-31). The statute itself provides no rules of procedure. No rules of procedure are published or respected by that tribunal. No regular practice of procedure by said tribunal is known. Repeating the details of multiple breaches of the most fundamental rights and principles of due process committed by that tribunal in the instant matter with regard to the three separate attempts by that tribunal to influence by its reports the determination of the Wayne Circuit Court, each without even pretended service of process in legal form or any other form effectuated otherwise than by challenge of jurisdiction, each without pretense of a hearing whereat the defendant would be protected in his right as a defendant under prosecution for crime, and two of them without pretense of any hearing whatsoever comporting with any accepted practice, and each without pretense of charges founding prosecution in the public behalf, would be a mere waste of reader's time.

That one can not without violence to due process be subjected to a tribunal operating under no known practice of regularity, is a simple and obvious conclusion from the mere primary objection, that the securities against unfair

and tyrannical administration of the law recognized in every civilized land today are not the same in litigation contended simply between private parties before an official serving as a umpire, and in litigation on behalf of the political power for an alleged wrong committed by the defendant in the nature of a tort. And unless the defendant is reasonably notified of the identity of his adversary, and given an opportunity to demand the special protections in such case due, no due process can be pretended,—so the evils as discussed herein at pp. 24-8.

The objection was timely presented without entry of any general appearance, and has been consistently preserved (R. 29-30, par. 7 and 8; R. 49, par, 9; R. 51, par. 12; R. 4-5, ground III; B. iii, question VII; B. 201-210 pointedly citing "definite and regular rules of practice" and "rules of regular and orderly procedure lacking" as a necessary element of due process on pages 202 and 205; p. 7-8, division V).

In the Brief for Friend of the Court, at p. 1, the Friend of the Court concedes: "The pivotal question raised by the appeal is, 'Is the Act creating the Office of the Friend of the Court unconstitutional?' "

Without doubt, if the proceedings of the office of the Friend of the Court were not to all practical purposes invariably in his private office excluding the opposing litigant, if his files were not private secret files, if he were not by that statute and parallel court rule constituted a prosecuting attorney in the same matter, and if his proceedings were before the open public and conducted according to regular rule, it could not be consistently urged that any party was denied a hearing in a proper court within the 14th amendment to the United States Constitution. But the contrary being the demonstrated fact, it is sufficient that no regular rule and known practice assure

any litigant before him of the due process which the Northwest Territorial Act and the 14th Amendment define and guarantee.

Known and regular procedure, the characteristic of regularity, are the very essence of due process:

> "The question here is not whether the tribunal *may* proceed in and with some regard to the rights of the person before it, but rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the Constitution, and without due process of law."
>
> *Cooley's Constitutional Limitations,* 7th ed., pp. 572-3, in a long footnote on equal protection of the laws and due process, quoted from *State v. Billings,* 55 Minn. 467; 25 N. E. 206 at 794.

Mr. Cooley was probably as close and careful a student of constitutional limitations as our nation has furnished us, and it is notable that in one of his opinions signed while a justice of the Michigan Supreme Court he wrote:

> "Of the very important proceedings for which this Act provides, no record whatever is directed. They are as informal as they can well be; and the directions given are so vague and general that anything like uniformity of action, in proceeding under the Act, could not possibly be looked for. If the proceeding is before the judge at chambers, he is without a clerk; and it might be conducted with less formality and with less probability of a record on which the parties could rely for the protection of their rights, than in the most insignificant action before a justice of the peace. The power of the judge in directing issues and modes of proceeding would be limited only in his discretion, and there

> would be no review of his action, except on the question of jurisdiction. It is impossible to enforce such a law. The failure to make adequate provision for notice to the parties concerned is fatal to it; but if notice were provided for, it would still be too vague, uncertain, and imperfect in its provisions."
>
> *Risser v. Hoyt,* 53 Mich. 185 at 208-9.

But due process in "directing issues and modes of proceeding" must rest on a basis more substantial than favor and discretion. And so this court has held.

Where an actual court was regulated by actual rules, but lacked a published rule assuring a defendant summoned with "but one day, and that a Sunday" to prepare his defense outside of travelling time, who therefore ignored the summons, that a due hearing and due opportunity would be allowed, the United States Supreme Court voided the judgment:

> "Very probably . . . the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would have been a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."
>
> *Roller v. Holly,* 176 U. S. 398; 20 S. Ct. 410 at 413-14.

It would therefore seem clear that, because of the wholly unregulated and usually irregular practice of the Friend of the Court, unregulated by any known practice or rules whatsoever, it is not a court to which the defendant appellant was bound to submit himself. And the refusal of the state of Michigan to permit either the matter against Joseph, or the action instituted by Joseph

himself, to be heard elsewhere than before that wholly unregulated officer amounted to an absolute denial of due process. The defendant appellant was deprived of a day in court, deprived of judicial process, deprived of that due process which is defined by the Northwest Territorial Act and guaranteed by the 14th Amendment. The statute and court rule so depriving him are void.

"It has been held that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal."

> *Cooley's Constitutional Limitations,* 7th ed., p. 591.

However, in this case and under the statute and court rule as interpreted, no trial is allowed on appeal. The only appeal known is the appeal by "objections." That appeal was filed (R. 27-31; R. 44-55), and the court ruled (R. 71) of the defendant appellant that he "demands the right to make a record in this court. This demand has been denied."

> "As applied to judicial proceedings, the requirement of due process of law involves the action of a competent and impartial tribunal possessing jurisdiction and clothed with authority to hear and determine the questions at issue, and following a regular and orderly course of legal procedure according to the rules established."
>
> *Black on Constitutional Law,* 4th ed., Section 234, p. 616.

PRAYER

For the reasons set forth in the five numbered issues foregoing, it is accordingly prayed that jurisdiction be accepted and appeal allowed, with benefit otherwise by writ of certiorari, that the determination rendered by the state of Michigan in the acts of its various officers herein appealed be reversed, and that the mandate of this court require a hearing in open court by due and regular procedure as provided in the Constitution of Michigan and by valid statutes relative to the petition on behalf of Joseph Metzinger dismissed below for the custody and services of his nearly mature son.

Respectfully submitted,

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March 12, 1945.